Petition

81-1174

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In The

Supreme Court of the United States

October Term, 1981

No.

ORTIZ FUNERAL HOME CORP.,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

—and—

LOCAL 1034, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA,

Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. After the expiration of a collective bargaining contract which defined a collective bargaining unit as including "receptionists", and as excluding "office clerical employees" and "managers", did the National Labor Relations Board ("the Board") have jurisdiction to decide that such expired collective bargaining contract included "office clerical employees" and "managers", as well as "receptionists"?

2. In interpreting such expired collective bargaining contract, did the statute require the Board to receive and to give effect to evidence of the intent of the parties in defining the collective bargaining unit as including "receptionists", and as excluding "office clerical

employees" and "managers".

3. Did the statute require the Board to defer to an arbitration award in this case?

4. Did the petitioner commit an unfair labor practice by demanding proof that the intervening labor union represented office clerical employees and managers, as well as receptionists, where the expired collective bargaining contract defined the unit as including receptionists, and as excluding office clerical employees and managers?

5. Did the Board unconstitutionally deprive the petitioner of procedural due process of law by charging and deciding that the petitioner wrongfully refused to bargain with its employees, and the evidence was that the petitioner demanded

proof of the union's claim that it represented office clerical employees and managers, as well as receptionists, and that the expired collective bargaining contract defined the unit as including receptionists, and as excluding office clerical employees and managers?

The Court of Appeals decided questions Nos. 1, 2 and 4 in the affirmative, and question No. 3 in the negative; and it did not decide question No. 5 which was presented in petitioner's briefs, and in the oral argument of its counsel.

By order dated October 5, 1981, the Court of Appeals denied a petition for rehearing, or for rehearing en banc.

LIST OF PARTIES TO THE PROCEEDING

Ortiz Funeral Home Corp., Petitioner.

National Labor Relations Board, Respondent.

Local 1034, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Intervenor.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

ORTIZ FUNERAL HOME CORP.,

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-against-

NATIONAL LABOR RELATIONS BOARD,

Respondent,

-and-

LOCAL 1034, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of

the United States Court of Appeals for the Second Circuit dated June 8, 1981 which enforced an order of the National Labor Relations Board dated July 18, 1980.

OPINION BELOW

The opinion and judgment of the United States Court of Appeals for the Second Circuit were filed in that Court on June 8, 1981, and are not yet officially reported. A copy of such opinion is printed beginning at page 1a of the Appendix herein.

Petitioner submitted a petition for rehearing, or for rehearing en banc, which the Court of Appeals denied by an order dated and filed in that Court on October 5, 1981. That order is printed beginning

at page 21a of the Appendix herein.

JURISDICTION

This petition for certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, filed June 8, 1981, is timely made within 90 days of the filing in that Court on October 5, 1981 of its order which denied a petition for rehearing, or for rehearing en banc.

The jurisdiction of this Court to review such judgment is invoked pursuant to 28 U.S.C. section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the 14th Amendment to the Constitution of the United States, in part, provides:

> " * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * * ."

Section 8(a)(1) and (5) of the Labor-Management Relations Act, 29 U.S.C. section 158(a)(1)(5), provides:

> "(a) It shall be an unfair labor practice for an employer-
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

STATEMENT OF THE CASE

(a) The Facts

For several years preceding December, 1974, the petitioner operated funeral parlors in New York City, which served mostly Hispanic families.

In 1974, the petitioner operated a main place of business at 524 Southern Boulevard, Bronx, New York, and several other places of business within the City of New York, at all of which it conducted funerals, serving mainly Hispanic families (A319; 389; 588).

In the fall of 1974, Local 1034 of the Teamsters Union ("the Union") tried to organize the petitioner's employees.

In December, 1974, the Union called a strike in which 16 receptionists employed by petitioner went on strike. Petitioner then had 35 employees (A319; 390; 519).

Petitioner conducted operations without such striking receptionists. The Union filed an unfair labor practice charge against the petitioner. On January

24, 1975, the General Counsel of the National Labor Relations Board ("the Board") issued a complaint (Case No. 2-CA-13540), which alleged that the petitioner violated section 8(a) (1) and (3) of the Act.

On March 21, 1975, the petitioner, and Michael Fleischer, the Union's business agent, with the participation of Joel Spivak, representing the Board, made an agreement which settled the strike, and which provided, among other things, that the petitioner shall recognize the Union as the exclusive bargaining representative of petitioner's employees in the following collective bargaining unit (A-489; 499-500; 1256):

> "All attendants, floorpeople, receptionists, interpreters and porters, excluding all licensed

> embalmers, undertakers, drivers, managers, office clerical employees, bookkeepers, guards, watchmen and supervisors as defined in Section 2(1) of the Act."

The strike settlement agreement required the petitioner to rehire only 7 of the 16 striking receptionists, which it did.

During the strike, the petitioner operated its funeral homes with one employee on the day shift at each branch funeral home, and one employee on the night shift.

After the strike ended, the petitioner continued to operate its funeral homes with one employee on the day shift at each branch funeral home, and one employee on the night shift.

After the strike ended, the petitioner and the Union negotiated and agreed

on a collective bargaining contract for the period from March 22, 1975 to March 21, 1978, which defined the collective bargaining unit in the same language as the strike settlement agreement of March 21, 1975, quoted above.

In addition, section 23(b) of the 1975-1978 collective bargaining contract provided:

> "Where any change would introduce new job classifications or new types of equipment or result in reduction of employment opportunities to workers covered by this Agreement, it must first be mutually agreed. As used herein, 'mutually agreed' shall require actual agreement and not resolution of a disagreement through arbitration."

The 1975-1978 collective bargaining contract contained no job descriptions defining the duties of employees whose titles were included in the collective

bargaining unit.

During negotiations on the collective bargaining contract, the Union claimed that it represented all of petitioner's employees, and not merely those whose titles were enumerated in the collective bargaining unit which was agreed in the strike settlement agreement of March 21, 1975 (A505-507; 527).

Because the Union made this claim, the petitioner asked for a list of names of its employees to whom the proposed 1975-1978 collective bargaining contract shall apply. The Union declined to agree to such a list, and the Union filed an unfair labor practice charge against the petitioner.

The Board ordered the petitioner to sign the proposed 1975-1978 collective

bargaining contract; and it ruled that the 1975 strike settlement agreement and the definition of the collective bargaining unit in the proposed 1975-1978 collective bargaining contract defined the collective bargaining unit by listing the titles of employees included therein; that the petitioner, as the employer, could ascertain for itself from its own records the names of employees included in the collective bargaining unit from the job titles which it gave them; and that, consequently, the petitioner did not need a list of names of its employees to whom the 1975-1978 collective bargaining contract applied.

The Court of Appeals enforced the Board's order, after which the petitioner signed the 1975-1978 collective bargaining

contract, which applied to the period from March 22, 1975 to March 21, 1978.

In compliance with the Union's demand, beginning in August, 1977, the petitioner submitted its payroll records to the Union's accountant for examination. Such accountant included all of petitioner's employees in the Union's claim that petitioner was required to pay money to the Union on their behalf for Union dues, and for employer contributions to the Union's insurance and severance funds, amounting to about $100,000 for the period from March 22, 1975 to March 21, 1978. In such claim, the Union and its accountant gave no effect to the express exclusion of managers and office clerical employees from the collective bargaining unit.

In compliance with the Union's demand, the petitioner agreed to submit the following dispute to arbitration:

> "Pursuant to the terms and provisions of the Collective Bargaining Agreement between the parties hereto, did the Employer violate the contract by failing to contribute monies to the Insurance and to the Severance Funds and to the Union on behalf of any employees? If so, what shall be the remedy?"

The arbitrator held hearings and made an award that:

> "the Employer violated the contract by failing to contribute monies to the Insurance and to the Severance Fund and to the Union on behalf of the following named employees, to the extent such monies are claimed by the Union not to have been paid."

Petitioner sued to vacate that award, which the New York Supreme Court vacated, but the Appellate Division of that Court reversed the lower court and reinstated

such award; and the New York Court of Appeals affirmed the order of the Appellate Division. Adelstein v. Ortiz, 75 A.D.2d 529, affd. 52 N.Y.2d 997 (1980).

On March 28, 1978, petitioner's president came to the Union's office to negotiate a new contract to replace the contract which expired on March 21, 1978.

The Union then demanded that the new contract shall apply to managers and office clerical employees, as well as to receptionists.

Petitioner then demanded proof that the Union then represented managers and office clerical employees, as well as receptionists.

The parties met on March 13, 1978, March 28, 1978, and April 7, 1978; and they wrote letters to each other until

April 21, 1978, but they did not resolve their difference whether the collective bargaining unit excluded managers and office clerical employees.

(b) The Proceedings Below

On March 23, 1978, the Union filed a charge that the petitioner refused to bargain with the Union (A807; 1321).

On May 9, 1978, the Board issued its administrative complaint in this case (No. 2-CA-15497), which alleged that the petitioner violated section 8(a) (5) and (1) of the Act by refusing to bargain with the Union (A801; 1325-1332).

On December 26, 1979, Marvin Roth, an Administrative Law Judge of the Board made a written decision upon evidence presented before him that the petitioner

violated section 8(a) (5) and (1) of the Act by refusing to bargain with the Union for a new contract to replace the contract which expired on March 21, 1978; that the exclusion of "managers, office clerical employees" from the collective bargaining unit in the expired contract was invalid; and that the collective bargaining unit consists of "managers, office clerical employees", as well as "attendants, floorpeople, receptionists, interpreters and porters".

On July 18, 1980, the Board approved the decision and order of the Administrative Law Judge; and it made such order effective retroactively to September 23, 1977.

The Board petitioned the Court of Appeals for the Second Circuit to enforce

its decision, which that Court enforced by its order and decision dated June 8, 1981, petition for rehearing or for rehearing en banc denied October 5, 1981.

REASONS FOR GRANTING THE WRIT

1. The Board's order of July 18, 1980, changed the collective bargaining unit defined in the strike settlement agreement of March 21, 1975, by expressly including "office clerks, office managers and office clerk-drivers" in the bargaining unit, whereas the strike settlement agreement of March 21, 1975, and the collective bargaining contract for the period from March 22, 1975 to March 21, 1978, expressly excluded "managers, office clerical employees" from the bargaining unit.

The Board approved the definition of the collective bargaining unit in the strike settlement agreement of March 21, 1975. Such definition was repeated verbatim in the 1975-1978 collective bargaining contract.

The Board had no power to change the agreed definition of the collective bargaining unit which it approved in the strike settlement agreement, and which the parties repeated in the 1975-1978 collective bargaining contract. NLRB v. Joclin Manufacturing Co., 314 F.2d 627, 633 (2d Cir. 1963).

The decision of the Court of Appeals said that in this case "the Board was not making an independent determination of unit membership; it was construing a contract"; and that the "question was one

of contract interpretation that should have been governed by the intentions of the parties", citing Tidewater Oil Co. v. NLRB, 358 F.2d 363, 365 (2d Cir. 1966); NLRB v. Tennessee Packers, Inc., 379 F. 2d 172, 182 (6th Cir. 1967), cert. denied, 389 U.S. 958 (1967).

The decision of the Court of Appeals also said that in this case "the Board could not alter the unit that had been agreed upon and approved," citing Tidewater Oil Co. v. NLRB, supra, 358 F.2d at 365.

The decision of the Court of Appeals also said that in this case, that Court would be inclined to deny enforcement and remand for a hearing on the issue of intent, if the Board's order had to stand on its own merits.

However, the Court of Appeals decided to enforce the Board's order of July 18, 1980, which changed the definition of the collective bargaining unit, by including managers and office clerical employees therein, on the ground that the "parties clearly intended to be bound by the arbitrator's decision, and have consistently expressed their willingness to do so."

We noted previously that section 23 (b) of the collective bargaining contract expressly prohibited an arbitrator from changing the classification of employees in the collective bargaining unit by requiring changes in classification of employees to be made only by "actual agreement", and not by "arbitration".

Moreover, the strike settlement

agreement of March 21, 1975, and the 1975-1978 collective bargaining contract contained no job descriptions of the duties of employees whose titles were listed therein, and no job descriptions of the duties of employees whose titles were excluded therefrom.

In the absence of such job descriptions in the 1975 strike settlement agreement, and in the 1975-1978 collective bargaining contract, there was no factual basis for the Board to make its own job descriptions or to accept the Union's suggested job descriptions, and thereby to change the collective bargaining unit by its order of July 18, 1980, which included managers and office clerical employees in the bargaining unit. Hilton International Co. v. Union de Trabajadores,

337 F. Supp. 882 (D. Puerto Rico, 1971). See, also: Rockland County Chapter, Civil Service Employees Assn. v. County of Rockland, 67 A.D.2d 684, 412 N.Y.S.2d 167 (1979).

In Porter Co. v. NLRB, 397 U.S. 99, 102-105 (1969), the Court said that the Board had no "power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement".

In this case, the Board had no power to compel the petitioner to agree to its job descriptions of the duties of its receptionists, managers, and office clerical employees, in the absence of such job descriptions in the 1975 strike settlement agreement, and in the 1975-1978 collective bargaining contract, and

because that contract provided that change shall be made only by "actual agreement", and not by "arbitration".

Petitioner never expressed willingness to be bound by the arbitrator's decision. Petitioner sued in the New York Supreme Court in 1978 to vacate the arbitrator's award, and obtained a judgment vacating such award; and when the Appellate Division reversed that judgment, petitioner appealed to the New York Court of Appeals and argued that the arbitration award should be vacated. The Court of Appeals ruled against the petitioner and affirmed the order reinstating the arbitrator's award. Adelstein v. Ortiz, 75 A.D.2d 529, affd. 52 N.Y.2d 997 (1980).

The petitioner continued to maintain in his briefs in the federal Court of

Appeals in opposition to the Board's petition to enforce its order of July 18, 1980, that the arbitrator had no power to change the collective bargaining unit, and that his award did not change the collective bargaining unit.

On its administrative complaint, in this case (No. 2-CA-15497), dated May 9, 1978, which alleged that the petitioner violated section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, the Board had no jurisdiction to decide on July 18, 1980, more than five years after the strike settlement agreement of March 21, 1975 defined the collective bargaining unit as including receptionists, and as excluding managers and office clerical employees, and after the expiration of the collective bargaining contract

on March 21, 1978, that the definition of the collective bargaining unit should be changed by including managers and office clerical employees therein.

Congress intended the courts, and not the Board, to interpret and to enforce collective bargaining contracts, including provisions therein defining collective bargaining units.

In Dowd Box Co. v. Courtney, 368 U.S. 502, 510-513 (1961), the Court said that by enacting section 301 of the Taft-Hartley Act, Congress "decided to make collective bargaining contracts enforceable only in the Courts"; and that "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law'." 368 U.S. at 513.

2. In interpreting the 1975-1978 expired collective bargaining contract, the Board was required to receive and to give effect to the intent of the parties in defining the collective bargaining unit as including "receptionists", and as excluding "office clerical employees" and "managers"; and the Board was also required to give effect to the provision in such contract which prohibited changes in classification of employees except by "actual agreement", and not by "arbitration".

The Board's Administrative Law Judge excluded testimony by petitioner's president that in the discussion which culminated in the strike settlement agreement in 1975 he said that he wanted the collective bargaining unit defined as including

receptionists, and as excluding office clerks (A1257); that he "insisted" on including in the unit receptionists or attendants, and excluding "clerical personnel" (A1258); that the Union asked him to rehire 16 to 17 strikers, but he said he could not do it; and the parties agreed that he shall rehire 6 or 7 strikers, after which he signed the strike settlement agreement (A1258-1259).

The Administrative Law Judge struck out the aforesaid testimony, "on the basis of the parol evidence rule" (A1259).

However, the Administrative Law Judge ruled that the words "receptionist" and "office clerical employee" were ambiguous, and that extrinsic evidence

was admissible as to the meaning of such words; and the Administrative Law Judge based his decision as to the meaning of these terms upon practices of large commercial and industrial corporations, of which he took judicial notice.

In these circumstances, the refusal to receive and to give effect to petitioner's evidence of his intention in negotiating the 1975 strike settlement agreement, and the 1975-1978 collective bargaining contract, was a clear error of law, which requires denial of enforcement of the Board's order of July 18, 1980.

In its decision of June 8, 1981, the Court of Appeals said that it can "find no discussions whatever of the parties' intentions" in the opinions of the Admin-

istrztive Law Judge and the Board; that the Court "would be inclined to deny enforcement and remand for a hearing on the issue of intent"; but that the Board reached the correct result which gave effect to the intention of the parties to be bound by the arbitrator's decision.

However, we showed supra, pp. 22-24. that the petitioner never intended to be bound by the arbitrator's decision; and that the petitioner's words and actions show that it has consistently opposed the arbitrator's decision.

3. The National Labor Relations Act did not require the Board to defer to the arbitration award in this case. The Administrative Law Judge's decision said that "where the result of an arbitration

proceeding does not warrant deferral because it is repugnant to the Act, the better procedure is for the Administrative Law Judge to make independent findings of fact, rather than to defer to the arbitrator's findings of fact".

The Board's decision, dated July 18, 1980 (250 NLRB No. 100, p. 2, n. 2), said that "we decline to defer to the arbitration award since the issue is one of representation and appropriate unit".

The decision of the Court of Appeals on June 8, 1981, said that "We need not decide whether, in view of the Board's 1976 order, it also should have deferred to the arbitrator's determination", citing Douglas Aircraft Co. v. NLRB, 609 F.2d 352 (9th Cir. 1979).

The Board is not required to defer to

an arbitration award which is not consistent with national labor policy. Carey v. Westinghouse Electric Corp., 375 U.S. 261, 272 (1964); Alexander v. Gardner-Denver Co., 415 U.S. 36, 50 (1974); Boire v. International Brotherhood of Teamsters, 479 F.2d 778, 801-802 (5th Cir., 1973); Local 7-210, Oil Workers v. Union Tank Car Co., 475 F.2d 194, 197-199, cert. denied 414 U.S. 875 (1973); Smith Steel Workers v. A.O. Smith Corp., 420 F.2d 1 (7th Cir. 1969).

The arbitration award only required the employer to:

> "Forthwith pay to each respective obligee the amount of money claimed respecting each such enumerated employee."

The arbitration award did not provide that managers and office clerical employees shall be included in the collective

bargaining unit.

The arbitration award could not so provide, because the collective bargaining contract expressly prohibited "any change" which "would introduce new job classifications", by requiring "actual agreement" and not "arbitration" concerning changes in job classifications.

Since the arbitration award is thus contrary to national labor policy, and since it decided only a collateral dispute whether the collective bargaining contract required the employer to pay money to the Union on behalf of its employees as union dues, and as contributions to the Union's insurance and severance funds, the Board was not required by law to defer thereto, and it declined to do so.

In Cannery Warehousemen, Food Proces-

sors, Drivers & Helpers Union v. Haig Berkesian, Inc., 623 F.2d 77 (9th Cir. 1980), the Court declined to confirm an arbitration award, and decided that "valid Board representation decisions take precedence over conflicting arbitration decisions."

4. Since the expired 1975-1978 collective bargaining contract defined the collective bargaining unit as including receptionists, and as excluding managers and office clerical employees, the petitioner did not commit an unfair labor practice by demanding proof to support the Union's claim that in bargaining for a new contract to follow the expired contract the Union represented office clerical employees and managers, as well

as receptionists.

Where the Union claims a right to bargain for employees who are not in the agreed collective bargaining unit, the employer may lawfully demand proof that the Union represents such employees for collective bargaining purposes. Food Service Employees Union v. NLRB, 422 F.2d 685, 688 (C.A.D.C. 1969); Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1115 (7th Cir. 1973); NLRB v. Blades Manufacturing Co., 344 F.2d 998, 1004 (8th Cir. 1965); NLRB v. Posner, Inc., 342 F.2d 826 (2d Cir. 1965), cert. denied, 382 U.S. 837 (1966); Edward Fields, Inc. v. NLRB, 325 F.2d 754 (2d Cir. 1963).

5. The Board unconstitutionally deprived the petitioner of procedural due

process of law by charging and deciding that the petitioner wrongfully refused to bargain with its employees, where the evidence was that the petitioner demanded proof of the Union's claim that it represented office clerical employees and managers, as well as receptionists, and that the expired collective bargaining contract defined the unit as including receptionists, and as excluding office clerical employees and managers.

In 1978 the Union demanded that the petitioner shall bargain with the Union on a proposed new collective bargaining contract, to follow the contract which expired on March 21, 1978; and that such new contract shall apply to managers and office clerical employees, as well as to receptionists.

Since the expired 1975-1978 collective bargaining contract expressly excluded managers and office clerical employees from the collective bargaining unit therein defined, petitioner demanded proof that in 1978 the Union represented managers and office clerical employees, as well as receptionists.

Thereupon the Union filed an unfair labor practice charge, alleging that such demand violated section 8(a)(1) and (5) of the Act, in that it interfered with, restrained and coerced employees in the exercise of their representation rights; and it constituted a refusal to bargain with the Union.

The Union's attorney, the arbitrator, and the Board's attorney, each said that they did not want to change the unit

defined in the collective bargaining agreement. Yet each of them demanded that managers and office clerical employees shall be deemed to be in the collective bargaining unit. Thus, the Union's attorney, Mr. Weinman, said:

> "It is absolutely not true that the union seeks anybody other than the unit defined by the Board and General Counsel's Exhibit 16 makes that perfectly clear and has been made clear over and over and over and over and over again, but counsel persists in his argument that yes we do; even though we say no, we don't." (A872).

In the same long statement, Mr. Weinman also said:

> "The very people that the employer or respondent contends are clerical workers or office clericals are the very people whom we contend are receptionists." (A873).

In General Counsel's Exhibit 16, Mr. Weinman wrote to petitioner's lawyer, Mr.

Turchin, on April 21, 1978:

> "As you know, the Union seeks precisely the bargaining unit set forth in the Board's stipulation and has never sought any other unit. Numbers are irrelevant. It is the nature of the work done by the employees that is decisive.
>
> * * * * *
>
> Accordingly, it is the nature of the Employer's business wherein it has 9 branches and a main office with 1 employee at each branch daytime and 1 employee at each branch nighttime, each of whom acts as a receptionist and performs receptionists' duties."

During the hearing on the unfair labor practice charge, the Administrative Law Judge declined to receive evidence of the negotiations that led to the definition of the collective bargaining unit. He said:

> "I am not willing to go back - get into the negotiations that led up to the choice of the particular words." (A1260).

Yet, the Administrative Law Judge changed his ruling and received in evidence the transcript of the hearing before the arbitrator, saying:

> "Well, I don't want the door opened, my point is, as far as I am concerned it's understood that the arbitration hearing contains all the objective evidence that I need to determine unit placement, if I have to determine unit placement." (A1173).

The decision of the Administrative Law Judge expressly changed the collective bargaining unit by including managers and office clerical employees therein, saying:

> "In sum, the evidence fails to indicate that the crucial classifications contained in the unit description have any special commonly understood significance in the funeral home industry which is pertinent to the Company's unique method of operation. In these circumstances, it is appropriate to look to the generally understood meaning of those classifications. In the context of the employment relationship, an attendant is normally regarded as an

> employee who waits on customers. See, Websters Third New International Dictionary, (1971 edition). Essentially such work comprises the largest part of the work normally performed by the branch employees. In sum, whether they be designated as receptionists, receptionist-porters, or more accurately, as attendants, and regardless of whether the Company has incorrectly classified them as office clerks, the employees at the branch locations perform unit work and are members of the bargaining unit."

Since the 1975-1978 collective bargaining contract contained no job descriptions of the duties of receptionists and attendants, the Administrative Law Judge, and the Board, had no power to make a new contract for the petitioner by saying that "it is appropriate to look to the generally understood meaning of those classifications".

Paragraphs 13 and 14 of the adminis-

trative complaint did not allege that the 1975 collective bargaining contract included managers and office clerical employees in the collective bargaining unit therein defined, nor that the generally understood meaning of receptionist and attendant was that he is a manager or an office clerical employee.

Thus, the petitioner had no notice in the administrative complaint, or in the proceedings thereon, that the Board claimed that a receptionist or an attendant was a manager or an office clerical employee; and, as we have shown, the Board's counsel, and the Union's counsel, expressly disclaimed any such contention.

In these circumstances, the making of a finding, administrative determina-

tion, and administrative order, on an issue not pleaded, of which the petitioner had no notice, unconstitutionally deprived the petitioner of procedural due process of law. In re Ruffalo, 390 U.S. 544, 550 (1967); Cole v. Arkansas, 333 U.S. 196, 201 (1947).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

November 27, 1981

Respectfully submitted,

MORRIS WEISSBERG
Attorney for Petitioner

N. GEORGE TURCHIN
of counsel

APPENDIX

OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

No. 730 September Term, 1980
Argued Jan. 29, 1981 Decided June 8, 1981

Docket No. 80-4207

----------X

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

LOCAL 1034, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor,

v.

ORTIZ FUNERAL HOME CORP.,

Respondent.

----------X

BEFORE: VAN GRAAFEILAND and KEARSE, Circuit Judges, and BRAMWELL, District Judge.*

Petition for enforcement of an order of the National Labor Relations Board

* Of the Eastern District of New York, sitting by designation.

finding respondent Ortiz Funeral Home Corp. guilty of certain unfair labor practices. Petition granted.

STEVEN M. FETTER, Attorney, National Labor Relations Board, Washington, D.C. (William A. Lubbers, General Counsel, John. E. Higgens, Jr., Deputy General Counsel, Robert A. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Vivian A. Miller, Attorney, National Labor Relations Board, Washington D.C., Of Counsel), for Petitioner.

RICHARD A. WEINMAN, New York, N.Y., for Intervenor.

MORRIS WEISSBERG, New York, N.Y., (N. George Turchin, New York, N.Y., Of Counsel) for Respondent.

VAN GRAAFEILAND, Circuit Judge:

This is a petition to enforce an order of the NLRB which held that respondent, Ortiz Funeral Home Corp., had violated

section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1), by:

> (1) refusing on and after March 28, 1978 to recognize and bargain with Local 1034, International Brotherhood of Teamsters, Chauffeurs, Warehousement and Helpers of America (the Union), for a new contract covering all unit employees;
>
> (2) failing to apply the previous contract to all unit employees between September 23, 1977 and its expiration on March 21, 1978, and by failing thereafter to continue to maintain the wages, hours, terms and conditions of employment established pursuant to that contract.

For reasons hereafter discussed, the petition for enforcement is granted.

Respondent operates a funeral business with ten chapels in the New York City metropolitan area. In 1975, following an organizational strike and unfair labor practice charges, an informal settlement agreement was reached between respondent

and the Union and approved by the Board's Regional Director. Pursuant to this agreement, respondent agreed to recognize and bargain with the Union as the exclusive representative of the employees in the following unit:

> [A]ttendants, floorpeople, receptionists, interpreters and porters but excluding licensed embalmers, undertakers, drivers, managers, office clerical people, bookkeepers, guards, watchmen, and supervisors as defined in the Act.

Thereafter, respondent and the Union could not agree whether employees whose duties included clerical work, driving, or guarding, in addition to receiving visitors, were properly included as "receptionists" in the bargaining unit. Because of this dispute, respondent refused to sign a collective bargaining contract incorporating the unit definition contained

in the settlement agreement until ordered to do so by the Board. See 225 NLRB 1342 (1976). The Board found that "the parties reached an oral binding agreement on all material aspects of a collective bargaining contract" and that the arbitration clause of the agreement was designed to resolve any uncertainty as to membership in the bargaining unit. Id. at 1345. The Board concluded that the unit, described as above quoted, was an appropriate unit for the purpose of collective bargaining, and held that respondent was guilty of an unfair labor practice by refusing to sign it. Id. This Court enforced the order without opinion on May 6, 1977, see 559 F.2d 1204 (2d Cir. 1977), following which a written contract, effective for a three-year period ending on March 21, 1978 was signed. [1]

The contract contained provisions for a union shop, checkoff of union dues, and employer payments to welfare, severance and retirement funds. Respondent applied these provisions only on behalf of the small number of employees whom it considered to be in the bargaining unit. In August 1977, after conducting an audit of respondent's payroll records, the Union concluded that respondent was failing to make contributions as provided in the contract. Discussion on the issue proved fruitless, and the Union invoked the contractural arbitration process.

The arbitrator was asked to determine whether respondent had violated the contract by failing to maintain a checkoff of union dues and to make payments to

welfare, severance and retirement funds on behalf of the employees whose membership in the Union was disputed. On November 10, 1978 the arbitrator ruled that the contract required respondent to make contributions on behalf of all the disputed employees except one "secretary-bookkeeper." On April 19, 1979 the New York State Supreme Court vacated the arbitrator's award on the ground that the arbitrator had exceeded his powers by reclassifying employees. The Appellate Division, First Department, reversed and reinstated the award. See Adelstein v. Ortiz Funeral Home Corp., 75 App. Div. 2d 529 (1980). On February 17, 1981 the Court of Appeals affirmed without opinion. Adelstein v. Ortiz Funeral Home Corp., Nos. 7748 and 7749 (N.Y. Feb. 17, 1981).

While the arbitration under the old contract was pending, the parties met in March 1978 to discuss a new one. However, their continuing disagreement regarding the composition of the bargaining unit precluded any progress toward consummation of a contract. Respondent submitted a list of its employees with their purported job classifications, asserting that only three of them were unit employees. The Union stated that it represented approximately twenty employees on the list.

On March 23, 1978 the Union filed an unfair labor practice charge alleging that respondent refused to bargain for a new contract. The complaint issued by the Board on May 9, 1978 described the bargaining unit as it was described in the expired contract and in the Board's 1976

order. It alleged that respondent had failed and refused to negotiate with the unit thus described for the new three-year contract until the Union produced proof that it was the majority representative of the employees in the unit.

Not content with the unit descriptions contained in the contract, the Administrative Law Judge redefined the unit and ordered respondent to cease and desist from refusing to recognize and bargain with the Union as the representative of the following unit:

> All employees at Respondent's main office and at its branch locations, including receptionists, receptionists-porters, office clerks, office managers and office clerk-drivers, but excluding licensed funeral directors, secretary-bookkeepers and drivers normally and regularly engaged in the performance of such functions, and excluding supervisors as defined in Section 2(1) of the Act.

The Administrative Law Judge said that he had revised the definition of the unit "to reflect the Company's most recent job classifications." He also stated:

> As the complaint alleges an unlawful refusal to bargain only since on or about March 28, 1978, I have not provided any remedy for the Company's failure to apply the terms of the expired contract to the unit employees.

Despite these statements by the Administrative Law Judge, the Board held that respondent's refusal to bargain on a new contract was simply a continuation of respondent's refusal to apply the expired collective-bargaining agreement "to those same employees." The Board found the respondent had violated section 8(a)(5) and (1) by failing to apply the expired contract to all unit employees between

September 23, 1977 [2] and the contract's expiration date, March 21, 1978, and by failing thereafter to continue to maintain the wages, hours and terms and conditions of employment established pursuant to the contract. It ordered respondent to make the various payments to the employees and the Union which the terms of the contract required.

DISCUSSION

Our task in passing upon the Board's petition has not been lightened by the manner in which the Board itself has handled the lengthy dispute between the parties.

Although it was apparent at the time respondent and the Union entered into their 1976 settlement agreement that they

disagreed sharply as to the makeup of the bargaining unit, the Board ordered them to execute a collective-bargaining contract with the dispute unsettled. The Board said that any uncertainty as to which employees were in the unit was a matter "which the contract's grievance-arbitration machinery is designed to resolve." Thereafter, the Union followed what it must have considered to be the Board's suggestion and demanded arbitration of the parties' differences arising out of the 1975-78 contract. Because negotiations for a new contract were entered into prior to the arbitrator's decision, the Union also filed an unfair labor practice charge which was based upon respondent's refusal to accede to the Union's definition of

the unit and to bargain accordingly. The Administrative Law Judge confined his order to the charges made in the complaint. Instead of limiting its remedy in a similar manner, the Board went back to the expired contract and found respondent guilty of unfair labor practices arising out of respondent's allegedly erroneous interpretation of the unit membership provided for in that contract. Neither the Administrative Law Judge nor the Board deferred to the arbitration award. [3]

The Board found that "the issue of [sic] whether Respondent violated Section 8(a)(5) and (1) by failing to apply the provisions of the collective-bargaining agreement before its expiration, and thereafter by failing to continue to

maintain the wages, hours, and terms and conditions of employment established pursuant to that agreement, was closely connected to the subject matter of the complaint and has been fully litigated." We disagree.

The original bargaining unit in this case was set up by agreement between the parties. As bargaining history, it was not conclusive upon the Board in determining what was an appropriate unit for subsequent contract negotiations. Westinghouse Electric Corp., 118 NLRB 1043, 1047 (1957). In making an independent determination of a proper bargaining unit, the Board may exercise reasonable discretion pursuant to section 9(b) of the National Labor Relations Act, 29 U.S.C.

§ 159(b). See NLRB v. Sunrise Lumber & Trim Corp., 241 F.2d 620, 624 (2d Cir.), cert. denied, 355 U.S. 818 (1957); NLRB v. Libbey-Owens-Ford Glass Co., 241 F.2d 831, 834-36 (4th Cir. 1957).

With respect to the agreed-upon unit, however, the Board was not making an independent determination of unit membership; it was construing a contract. NLRB v. Joclin Manufacturing Co., 314 F.2d 627, 633 (2d Cir. 1963). The question was one of contract interpretation that should have been governed by the intentions of the parties. Tidewater Oil Co. v. NLRB, 358 F.2d 363, 365 (2d Cir. 1966); NLRB v. Tennessee Packers, Inc., 379 F.2d 172, 182 (6th Cir.), cert. denied, 389 U.S. 958 (1967). Although, in determining that

intent, the Board was not confined to the four corners of the contract, International Union of Electrical, Radio & Machine Workers v. NLRB, 418 F.2d 1191, 1201 (D.C. Cir. 1969), the Board could not alter the unit that had been agreed upon and approved. Tidewater Oil Co. v. NLRB, supra, 358 F.2d at 365.

We have examined very carefully the opinions of the Administrative Law Judge and the Board and find no discussion whatever of the parties' intentions. The Administrative Law Judge treated the settlement agreement as the equivalent of a certification following a Board-conducted election, and followed general Board standards in determining unit composition. He informed counsel at the hearing that he

was unwilling to "get into the negotiation that led up to the choice of the particular [contract] words" and stated in his decision that he had not taken into consideration the arbitration testimony of respondent's president concerning his version of the 1975 negotiations. The Board apparently accepted the reasoning of the Administrative Law Judge.

If the Board's order had to stand on its own merits, we would be inclined to deny enforcement and remand for a hearing on the issue of intent. However, with regard to this issue, there is one point on which there has never been any disagreement between the respondent and the Union. By the terms of their original settlement stipulation, they agreed to

submit their disputes to arbitration. The parties clearly intended to be bound by the arbitrator's decision and have consistently expressed their willingness to be so bound. We need not decide whether, in view of the Board's 1976 order, it should also have deferred to the arbitrator's determination. See Douglas Aircraft Co. v. NLRB, 609 F.2d 352 (9th Cir. 1979). If the Board had done so, it would have complied with the parties' intentions and reached the same result that it did. We see no reason, therefore, to reject that result because we are troubled by the manner in which it was reached.

The Board's petition for enforcement of its order is granted.

FOOTNOTES

1. The contract provided in part:

> Excluded from the coverage of this agreement are licensed embalmers, undertakers, drivers, managers, office clerical employees, bookkeepers, guards, watchman [sic] and supervisors as defined in the Labor Management Relations Act of 1947 as amended, hereinafter referred to as the "Act."

2. Because of limitations contained in section 10(b) of the Act, 29 U.S.C. § 160(b), the complaint of unfair labor practices is limited to the six-month period prior to the filing of the charge with the Board, which occurred in this case on March 23, 1978.

3. At the time of the Board's decision, there was still uncertainty as to whether the New York Court of Appeals would affirm the Appellate Division's

reinstatement of the arbitrator's award.

ORDER DENYING PETITION FOR REHEARING
OR FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of October, one thousand nine hundred and eighty-one.

----------X

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

LOCAL 1034, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor,

v.

ORTIZ FUNERAL HOME CORP.,

Respondent.

----------X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent, Ortiz Funeral Home Corp.,

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro,
Clerk
by Francis A. Gurdhart
Chief Deputy Clerk

Appendix

Office - Supreme Court, U.S.
FILED
DEC 1 1981
ALEXANDER L. STEVAS,
CLERK

81-1174

In The

Supreme Court of the United States

October Term, 1981

No.

ORTIZ FUNERAL HOME CORP.,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

—and—

LOCAL 1034, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA,

Intervenor.

appendix to

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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DECISION BY NATIONAL LABOR RELATIONS BOARD, DATED JULY 18, 1980

FPT

250 NLRB No. 100

D--6613
New York, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ORTIS FUNERAL HOME CORP.

and

Cases 2--CA--15497
and 2--CA--15536

LOCAL 1034, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On December 26, 1979, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, Respondent, the Charging Party, and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union for a new contract beginning on March 28, 1978, by erroneously insisting that the appropriate unit did not include

a large number of its employees.

The Administrative Law Judge further found that Respondent failed to apply the contract which expired on March 21, 1978, to the same group of employees because of the same erroneous contention. Nevertheless, because the complaint alleged an unlawful refusal to bargain only since on or about March 28, 1978, the Administrative Law Judge did not find a violation or provide any remedy for Respondent's failure to apply the terms of the contract which expired on March 21, 1978. The General Counsel contends that the matter of Respondent's refusal to apply the contract to all unit employees was fully litigated and urges the Board to find the additional 8(a)(5) and (1) violations. We find merit in the General Counsel's

contention.

As fully set forth by the Administrative Law Judge, the parties extensively litigated the question of which employees were in, and which employees were not in, the unit. Respondent conceded that, since the contract was signed following litigation in an earlier proceeding,[3] it has taken the position that the appropriate unit did not include a large proportion of its employees whom it claims are office clerical employees. Respondent also acknowledged that it did not apply the contract to these employees. Consistent with this position, Respondent refused to recognize and bargain with the Union for a new contract which would cover these employees ---the action which the Administrative Law Judge found unlawful.

Thus, Respondent's unlawful refusal to bargain on a new contract covering certain unit employees was but a continuation of Respondent's earlier unbroken course of conduct in refusing to apply the previous collective-bargaining agreement to those same employees. The allegation that Respondent unlawfully refused to apply the contract and the allegation that Respondent unlawfully refused to bargain on a new collective-bargaining agreement both turn on the same question---who is in the unit?

We find, therefore, that the issue of whether Respondent violated Section 8(a)(5) and (1) by failing to apply the provisions of the collective-bargaining agreement before its expiration, and thereafter by failing to continue to maintain the wages, hours, and terms and condi-

tions of employment established pursuant to that agreement, was closely connected to the subject matter of the complaint and has been fully litigated.[4]

Accordingly, we find that Respondent has violated Section 8(a)(5) and (1) of the Act by failing to apply the contract to all unit employees between September 23, 1977,[5] and its expiration on March 21, 1978, and by failing thereafter to continue to maintain the wages, hours, and terms and conditions of employment established pursuant to that contract.[6]

Amended Remedy

In addition to the remedy provided by the Administrative Law Judge, we shall order Respondent to take whatever actions are necessary to fulfill its obligations

under the collective-bargaining agreement from September 23, 1977, until its expiration on March 21, 1978, and to continue to maintain the wages, hours, and terms and conditions of employment established pursuant to that agreement until such time as the parties bargain to a new agreement or reach a bona fide impasse in such contract negotiations.

The evidence shows that, in particular, Respondent failed to make payments to a welfare fund and a severance and retirement fund on behalf of unit employees and refused to check off union dues for those employees. We, therefore, shall order Respondent to make whole the unit employees and the Union by paying into the aforesaid funds all contributions which it has, since September 23, 1977, failed to deposit there-

in, and by reimbursing employees for any medical or dental bills they have paid to health care providers that the contractual policies would have covered, as well as any premiums they may have paid to third-party insurance companies to continue medical and dental coverage in the absence of Respondent's required contributions. Further, we shall order Respondent to reimburse any employees for contributions they themselves may have made for the maintenance of the Union's welfare and severance and retirement funds since September 23, 1977.[7]

Respondent also shall be required to reimburse the Union for any dues which, pursuant to dues-checkoff authorizations, it failed to deduct from the employees' paychecks and transmit to the Union as

required by the contract between September 23, 1977, and its expiration on March 21, 1978, insofar as the Union has not obtained such dues directly from employees.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Ortiz Funeral Home Corp., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraphs 1(b) and 1(c), and redesignate present paragraph 1(b) as 1(d):

"(b) Failing and refusing to apply the terms of the collective-bargaining agreement with the above-named Union which became effective on March 22, 1975, for the period between September 23, 1977, and the expiration of that agreement on March 21, 1978, and failing and refusing thereafter to maintain the wages, hours, and other terms and conditions of employment established pursuant to that agreement until such time as the parties bargain to a new agreement or reach a bona fide impasse in such contract negotiations, including failing and refusing to make contributions on behalf of all unit employees to the Insurance Trust Fund Local 1034 and to the Local 813 and Local 1034 Severance & Retirement Trust Fund, as established pursuant to that agreement.

"(c) Failing and refusing to remit to the above-named Union dues which Respondent is required to check off for all unit employees pursuant to dues-checkoff authorizations as provided for in the aforesaid agreement for the period between September 23, 1977, and the expiration of that agreement on March 21, 1978."

2. Insert the following as paragraphs 2(b) and (c), and redesignate the subsequent paragraphs accordingly:

"(b) Apply the provisions of the collective-bargaining agreement with the above-named Union which became effective on March 22, 1975, for the period between September 23, 1977, and its expiration on March 21, 1978, and thereafter maintain the wages, hours, and other terms and conditions of employment established pursuant to

that agreement, in the manner set forth in the section of this Decision titled, "Amended Remedy," including: (1) making whole all unit employees for any loss of wages and benefits they incurred because of Respondent's failure to apply or thereafter maintain the established terms and conditions of that agreement;[8] (2) transmitting the contributions owed to the Insurance Trust Fund Local 1034 and to the Local 813 and Local 1034 Severance & Retirement Trust Fund since September 23, 1977, as established pursuant to that agreement; and (3) reimbursing unit employees for any medical and dental expense ensuing from Respondent's unlawful failure to make such contributions since September 23, 1977. This shall include reimbursing employees for contributions they

themselves may have made for the maintenance of the Union's welfare and severance and retirement funds after Respondent unlawfully failed to contribute, for any premiums they may have paid to third-party insurance companies for medical and dental coverage, and for any medical or dental bills employees have paid directly to health care providers that the contractual policies would have covered.

"(c) Reimburse the above-named Union for any loss of dues occasioned by Respondent's failure, between September 23, 1977, and March 21, 1978, to deduct dues pursuant to checkoff authorizations and to remit the same to the Union as required by the collective-bargaining agreement which expired March 21, 1978."

3. Substitute the attached notice for

that of the Administrative Law Judge.

Dated, Washington, D.C. July 18, 1980.

John H. Fanning, Chairman

John A. Fenello, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

FOOTNOTES

1. The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

2. The Administrative Law Judge refused to defer to the arbitration award as vacated and set aside by Judge Schwartz of the Supreme Court of New York County, entered March 28, 1979, and April 19, 1979, on the grounds Judge Schwartz' decision is based on a premise which is contrary to Board law. Subsequently, the Appellate Division of the Supreme Court for the First Judicial Department in the County of New York on April 15, 1980, issued an order reversing the judgment and order of Judge Schwartz and granting the Union's petition to confirm the arbitration award. There is no indication as to whether that decision has been appealed.

The Union in its exceptions states that, contrary to the assertion of the Administrative Law Judge that none of the parties urged deferral, it has always taken the position that the Board should defer to the

arbitration award, although it states that its position may have been evident only from off-the-record discussions. In any event, we decline to defer to the arbitration award since the issue is one of representation and appropriate unit. See Williams Transportation Company, 233 NLRB 837, 838 (1977); Marion Power Shovel Company, Inc., 230 NLRB 576, 577--578 (1977); Hershey Foods Corporation, 208 NLRB 452, 457 (1974).

3. Ortiz Funeral Home Corp., 225 NLRB 1342 (1976).

4. See The Timken Company, 238 NLRB 757, 758 (1978); Meilman Food Industries Inc., 234 NLRB 698, 699 (1978); Crown Zellerbach Corporation, 225 NLRB 911, 912 (1976); Rochester Cadet Cleaners, Inc., 205 NLRB 773 (1973).

5. The charge alleging an unlawful refusal to bargain was filed on March 23, 1978. Thus, our finding and remedy with respect to the failure to honor the contract is limited to Respondent's conduct occurring within the 10(b) period. Of course, this limitation has no effect on any obligation Respondent has to comply with the arbitrator's award.

6. Although the provisions of a collective-bargaining agreement do not survive beyond its expiration, it is well established that after the expiration of such an agreement an employer may not uni-

laterally change the terms and conditions of employment established pursuant to that agreement until a new contract is negotiated or the parties reach an impasse in bargaining. This, of course, does not apply to a union's right to dues checkoff, which is estinguished on expiration of the collective-bargaining agreement creating that right. Bethlehem Steel Company (Shipbuilding Division), 136 NLRB 1500, 1502 (1962).

7. Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. Merryweather Optical Co., 240 NLRB No. 169 (1979).

8. In the event that Respondent is re-

quired to pay employees backpay or reimburse them for other losses pursuant to this Order, interest on all such sums shall be paid in the manner prescribed in Florida Steel Corporation, 231 NLRB 651 (1977). See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

DECISION BY ADMINISTRATIVE LAW
JUDGE MARVIN ROTH DATED
DECEMBER 26, 1979

JD-870-79
New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ORTIZ FUNERAL HOME CORP.

Respondent

and

Cases Nos.
2-CA-15497
2-CA-15536

LOCAL 1034, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

Charging Party

Randall N. Harakal, Esq., and
Irwin M. Portnoy, Esq., of
New York, NY, for the
General Counsel.
Richard A. Weinmann, Esq., of
New York, NY, for the
Charging Party.
N. George Turchin, Esq., of
New York, NY, for the
Respondent.

DECISION

Statement of the Case

MARVIN ROTH, Administrative Law Judge: These consolidated cases were heard at New York, New York, on October 23, 30 and 31 and November 1, 1978.[1] The charges were filed on March 23 and April 5 respectively, by Local 1034, International Brotherhood Of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein the "Union"). The consolidated complaints, which issued on May 9 and (as to Case No. 2-CA-15536) were amended at the hearing, allege that Ortiz Funeral Home Corp. (herein "Respondent" or the "Company:), violated Section 8(a)(1),(3) and (5) of the National Labor Relations Act, as amended. The gravamen of the complaint in Case No. 2-CA-15497 is that the Company unlawfully

failed and refused to recognize and bargain with the Union as the exclusive collective bargaining representative of its employees in the appropriate unit. The gravamen of the complaint in Case No. 20CA-15536 is that the Company threatened its employees with reprisal if they joined or assisted the Union, directed them to withdraw membership in the Union, and engaged in several discriminatory actions against employee Carlos Quintana which culminated in his constructive discharge. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs.

Upon the entire record in this case[2]

and from my observation of the demeanor of the witnesses, and having considered the briefs submitted by the parties, I make the following:

Findings of Fact

I. The Business of the Respondent

The Company, New York corporation with its principal office and place of business in the Bronx, New York, is engaged at various facilities in New York City in the business of operating funeral homes and providing burial and related services. In the operation of its business, the Company annually receives gross revenues in excess of $500,000 and annually purchases goods valued in excess of $25,000 directly from firms located outside the State of New York. I find, as the Company admits, that it is

an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background: Nature of the Company's Operations, and History of Litigation and Negotiations Involving the Union's Representative Status

The Company maintains its main office and principal place of business at 524 Southern Boulevard in the Bronx. That facility consists of the main office, several chapels, i.e. locations for the performance of funeral services, and a garage. The Company also maintains branch facilities at various locations in the Bronx,

Manhattan and Brooklyn. As of the spring of 1978, the Company had nine such facilities, referred to in the Company's stationery letterhead as "conveniently located chapels."[3] In fact, funeral services are conducted at all of the facilities. As indicated, the Company is engaged in the business of operating funeral homes and providing burial and related services. The Company principally serves the Hispanic community. Prior to December, 1974, the Company usually had two employees working together at each branch facility. In late 1974 the Union conducted an organizational campaign among the Company's employees and in December 1974, commenced a strike against the Company. As an outgrowth of these developments, the Union filed an unfair labor practice charge, and

January 24, 1975, the General Counsel of the Board, by the Regional Director, issued a complaint (Case No. 2-CA-13540) alleging that the Company was violating Section 8(a)(1) and (3) of the Act, and requesting a remedial bargaining order. The complaint alleged, in sum, that a majority of employees in an appropriate unit designated the Union as the collective bargaining representative, that the Union requested but was refused recognition, that the Company engaged in unlawful threats and interrogation, and discriminatorily discharged eight employees, and that the strike was caused or prolonged by the Company's unfair labor practices. On March 21, 1975 the Company and the Union entered into an informal settlement agreement which was subsequently approved by the Board's Regional Director.

The Company agreed in sum, to refrain from in any manner interfering with, restraining or coercing its employees in the exercise of their section 7 rights, to reimburse the alleged discriminatees for their losses and to reinstate them (except for one who waived reinstatement), and to recognize and bargain with the Union as the exclusive representative of the employees in the following unit:

> All attendants, floorpeople, receptionists, interpreters and porters, excluding all licensed embalmers, undertakers, drivers, managers, official clerical employees, bookkeepers, guards, watchmen and supervisers as defined in Section 2(11) of the Act.

Eventually all of the reinstated employees left the Company's employ. After the strike, the Company's volume of business was lower than it had been prior to

the strike. The Company "streamlined" its personnel complement. This change was principally effectuated by having only one employee regularly on duty at a time at each of the branch facilities. One employee worked a day shift, normally from 8 a.m. to 4:30 p.m., and a second worked an evening shift, normally from 4:30 p.m. to midnight. Prior to the strike, the Company had a personnel complement which ranged from 30 to 35. As of March 28, 1978, the Company had a personnel complement of 22, including its president Michael Ortiz. Ortiz testified in the arbitration proceeding (discussed infra), that he eliminated the "receptionist" at the branch locations, as an unnecessary "luxury". Ortiz defined a receptionist as "a person or individual who opens the door for people and is a

greeter and would direct or show people where different chapels are where bodies may be laying." The Company contended in the arbitration proceeding and contends in this proceeding, that by reason of paperwork and arrangements performed by the employees at its branch facilities, they are "office clerks" and therefore excluded from the recognized bargaining unit. The Company contends that with the exception of three employees, apparently working at the main facility, whom it classified as "receptionists", the March 28 complement consisted of "office clerks" or other personnel who fell into job categories which were excluded from the unit.

Following the settlement agreement the parties bargaining over and negotiated a contract, but their efforts resulted in

further Board litigation. The Union filed a charge, and on September 29, 1975 the General Counsel issued a complaint alleging that the Company was violating Section 8(a)(5) and (1) of the Act by refusing to sign a contract which had been agreed upon by the parties. Following a hearing, Administrative Law Judge Benjamin B. Lipton issued a Decision and recommended order, which was substantially affirmed by the Board (225 NLRB 1342, decided September 16, 1976), finding that the Company violated the Act as alleged in the complaint. Judge Lipton found, in sum, that the parties negotiated a contract, but that a question arose as to the number of employees in the unit. The Union said that there were 18 to 21 employees, and the Company countered that there were only 3 or 4. The Union proposed

to submit the matter to arbitration but the Company refused to sign the agreed upon contract only because the Union refused to specify the names of the employees covered thereby. Judge Lipton found that the Company thereby violated Section 8(a)(5) of the Act. Specifically, Judge Lipton found that: (1) the Company's demand was an afterthought, in that the Company did not request a list of names until after negotiations were completed; (2) the demand was a delaying tactic; (3) the bargaining unit is defined by classifications, not names; (4) the Company knew from the classifications which employees were included in the unit; and (5) assuming that there was a genuine dispute, the contractual grievance and arbitration machinery was designed to resolve that dispute. The Board ordered the

Company to sign the agreed upon contract covering the bargaining unit employees i.e., the same unit defined in the previous settlement agreement, and to refrain from violating the Act in any like or related manner. Neither the Administrative Law Judge nor the Board discussed the relative merits of the parties' positions as to the number of employees in the unit. On June 6, 1977, following oral argument, the United States Court of Appeals for the Second Circuit enforced, without opinion, the Board's Order. The Company thereupon signed the agreed upon contract, which was effective by its terms from March 22, 1975 through March 21, 1978.[4]

Unfortunately, the protracted litigation failed to resolve the underlying controversy between the parties. The contract,

which the Company signed only because it was ordered to do so, contained provisions for a union shop, checkoff of union dues, and employer payments to welfare and to severance and retirement funds. The Company applied these provisions only on behalf of those employees whom it considered to be in the bargaining unit, i.e., the relatively small number of employees whom it classified as "receptionists." The contract also provided for resolution of disputes or differences between the parties, initially through discussion, but failing such efforts, through binding arbitration by an Arbitrator designated by the New York State Mediation Board. The contract further provided, in sum, that the Arbitrator could interpret, but not change, add to or subtract from, the terms of the contract. In August, 1977, the Union

requested and was granted permission to make an audit of the Company payroll records for all of its employees since March, 1975. As a result of the audit, the Union concluded that the Company was failing to make contributions and to check off dues as provided in the contract. Union auditor Stanley Weinblatt testified in the arbitration proceeding that he included in the Union's claim, all personnel listed on the Company's payroll records for the contract period, because he had no way of knowing the category of each individual. Discussion between the parties proved fruitless, and the Union invoked the contractual arbitration process. Whether or not the Company furnished Weinblatt with records which clearly indicated the job categories of each employee (and the arbitration transcript is

not conclusive in this regard), it is evident that the Union and the Company were talking on different levels. The Union was concerned with the nature of the work performed by the employees, whereas the Company viewed the job titles which it assigned to the employees as being dispositive of their status vis-a-vis the unit. Specifically, the Company regarded most of the employees at the branch facilities as "office clerks" who were excluded from the bargaining unit, and the Union did not accept this definition.

During the course of discussions between the Company and the Union in the late summer and early fall of 1977, Company president Ortiz received a letter from Union auditor Weinblatt, dated October 14, 1977, the text of which stated as follows:

Re: Fund contributions, etc.

Dear Mr. Ortiz:

This will confirm our receipt of your letter dated October 3, 1977, and our subsequent telephone conversation during which you advised me that the reason for your position was that you were advised that you should see the check-off cards first for those employees whom you agreed you were liable for. Accordingly, I am enclosing copy of such check-off cards and a list of the signatories. Please note that there are four additional employees who executed such cards. A supplementary bill is therefore also included for the amounts due for those four employees. I'll assume that you will likewise agree that contributions are due on their behalf as you agreed they were due for the others.

Accordingly, I would appreciate receipt of your check by return mail on behalf of the employees whose check-off card copies have now been furnished to you.

The letter was accompanied by five purported copies of membership applications and checkoff authorizations for five em-

ployees, together with a statement of dues and initiation fees owed for four of those employees. None of the five individuals were still employed by the Company as of March 28, 1978. Company President Ortiz testified that upon receiving the letter, he called Union president Bernard Adelstein and told him that the five individuals were office clerks who were not in the bargaining unit. The context and correct significance of Weinblatt's letter is not entirely clear. Ortiz' October 3 letter, referred to by Weinblatt, was not presented in evidence in this case. Weinblatt was not presented as a witness in the present unfair labor practice proceeding, and he did not testify about the letter at the arbitration hearing. Bernard Adelstein testified that he was not

familiar with the letter. However, in light of subsequent discussions between the parties (which will be discussed, infra), it is evident that the October 14 letter was the only occasion on which the Union furnished membership applications or checkoff authorizations on behalf of employees who the Company contended were outside of the recognized bargaining unit.

On December 15, 1977 the Union sent a letter to the Company requesting negotiation of a contract to replace the existing contract which was scheduled to expire on March 21, 1978. On March 6, union secretary-treasurer Martin Adelstein (Bernard Adelstein's son) sent a letter to the Company, enclosing the Union's contract proposals, and requesting that they meet on March 10 at 11:00 a.m. at the Union's

office. Martin Adelstein testified that the date reflected confirmation of an agreement between Company president Ortiz and Union business agent James Leahy. In the meantime, on February 3, the arbitration hearing opened before Arbitrator David S. Lande. Arguments were presented and testimony of one witness was taken on that date, but the Arbitrator suggested that the parties make a further effort to resolve the dispute. On March 10, Michael Ortiz came to the Union office, accompanied by his attorney, Jacob Rabinowitz. It immediately developed that there was a misunderstanding as to the purpose of the meeting. Ortiz found only Martin Adelstein and Union Attorney Richard Weinmann. Ortiz asked about Bernard Adelstein, and was told that he was in California. Martin Adelstein

stated that he was prepared to meet and discuss a contract and any other matters. Ortiz answered that he was not there to negotiate a contract, but to meet with Bernard Adelstein to try to settle the arbitration matter. Ortiz added that if he knew a contract would be discussed, he would have brought Attorney George Turchin (Turchin represented the Company in the arbitration proceeding and represents the Company in the present proceeding). Ortiz did make a monetary proposal for settlement of the arbitration, but Martin Adelstein subsequently informed his father that the amount was too low.[5]

After Bernard Adelstein returned to New York, the parties scheduled another meeting for March 28. In the meantime, the arbitration proceeding went through two

additional days of hearing (March 6 and 22), the Union filed its charge alleging a refusal to bargain, and events occurred, as a result of which General Counsel now alleges that the Company threatened and harassed Carlos Quintana because he applied for union membership. The arbitration matter was not discussed at the March 28 meeting, and both parties understood (Michael Ortiz so testifying) that they were there to d iscuss a contract. Bernard Adelstein and Attorney Weinmann were present for the Union and Michael Ortiz and Attorney Turchin for the Union. Adelstein asked Ortiz if he was ready to negotiate a contract, and Attorney Turchin answered that he wanted to see the Union's cards. Adelstein asked if they were "playing games again," asserted that they were

there to negotiate a contract, and refused to show any signed cards. Adelstein asserted that Carlos Quintana was penalized for signing a card and that other members had been fired. Turchin asked to see the results of the Union's "survey," but Adelstein replied that they had nothing.[6] Adelstein said that the Union was only seeking to represent the employees in the "unit", and Turchin asserted that the Company would recognize the Union for the people in the "unit". However, as always, they could not agree on who was in the unit. The attorneys discussed possible means of resolving the question. The Company agreed to supply a current list of employees and their job titles, and the meeting essentially ended on this note. There was no discussion of contract terms.

Immediately following the meeting, the Company furnished the Union with a purported list of current employees and their job classifications. The list was prepared by Company secretar-bookkeeper Edna Mattei. There is no dispute as to the number or identity of the employees, but their classifications, or the accuracy of such classifications, were and still are very much in dispute. The list (with corrections of obvious misspellings or other errors) is as follows:

Enclosed please find list
of correct employees: March 28, 1978

		Job Classification:
1.	Arthur Puerta	Receptionist
2.	Anna McKeacham	Secretary
3.	Carlos Cruz	Office Clerk-Driver
4.	Pedro Castro	Office Clerk
5.	Anna Loperina	Secretary
6.	Cruz Melendez	Office Manager
7.	Michael C. Ortiz	President

8.	Richard Ortiz	Office Clerk-Office Manager
9.	Nancy M. Ortiz	Secretary-Bookkeeper
10.	James Sibley	Funeral Director
11.	Ignacio Otin	Office Clerk
12.	Antonio Quiros	Office Manager
13.	Gilberto Taveras	Office Clerk
14.	Carlos Vazquez	Office Clerk
15.	Harvey Williams	Funeral Director
16.	Roger Rojas	Office Clerk
17.	Barbara Ortiz	Receptionist
18.	Alfredo Serrana	Office Clerk
19.	Edna Mattei	Secretary-Bookkeeper
20.	Iris Valez	Secretary
21.	Carlos Quintana	Office Clerk
22.	Blanche Rivera	Receptionist

The parties next met on April 7, with the same individuals present as were at the March 28 meeting. Adelstein asked if the Company was ready to negotiate. Attorney Turchin asserted that there were only 3 unit employees on the list (the 3 identified as receptionists) and asked if the Union wanted to negotiate for them. Adelstein asserted that the Union represented

about 20 of the 22 individuals on the March 28 list. In fact, as a result of stipulations between the parties in the ongoing arbitration proceeding, the parties knew as of March 6, which individuals were in dispute. As a result of personnel turnover during the 3-year contract period, the status of some 135 individuals was ostensibly in dispute, including those whose names appeared on the Company's March 28 list. As a result of stipulations, the number in dispute was slightly reduced. With respect to the Company personnel as of March 28, the Union conceded that Michael Ortiz, Harvey Williams and Edna Mattei were outside of the unit, and the Company conceded that "receptionists" Arthur Puerta, Barbara Ortiz and Blanche Rivera were in the unit.

At the April 7 meeting, the parties discussed means whereby the unit composition problem could be resolved. They agreed in principle on joint interviews with the employees. Attorneys Weinmann and Turchin were to work out the details. Eventually they failed to reach agreement. Neither testified as a witness, and there was no stipulation as to the reasons why no agreement was reached. However, the tenor of their correspondence indicates that Turchin wanted job titles to be decisive, whereas Weinmann considered the nature of work performed to be decisive. Bernard Adelstein testified that at both the March 28 and April 7 meetings, Turchin asserted that the Company had a good faith doubt of the Union's majority status. However, Adelstein's testimony was incon-

sistent with a letter which he sent to Michael Ortiz on April 14, in which he purported to summarize both meetings. According to Adelstein's letter, Turchin stated at the March 28 meeting that the Company recognized the Union but that the unit had to be clarified; and stated at the April 7 meeting that the Company would not bargain unless the Union showed proof of majority and that the Company would recognize the Union "for whatever number we had a majority of." Actually, by subsequent correspondence from the attorneys, the parties made clear their respective positions. By letter dated April 18, Turchin informed Adelstein that "In view of your claim to represent virtually all of the Employees of the Employer, the Employer has a good faith question as to

the majority status of the Union." Turchin added that the Company would recognize the union as representative of any employee who signed a union card indicating that the employee was a "receptionist" or in any other unit category. By letter dated April 21, Attorney Weinmann responded to Turchin's letter. Weinmann asserted that the Union sought to represent only the unit employees, and that the nature of the work done by the employees was decisive. Weinmann further asserted that the Company had a main office and nine branches, with one employee at each branch on days and one on nights, and that all of them functioned as "receptionists." Weinmann further asserted that Edna Mattei was the only office clerical. Weinmann conceded that Harvey Williams was a licensed funeral

director who was excluded from the unit. However, he asserted that James Sibley, although licensed as a funeral director, performed no embalming or undertaking work, but actually worked as a receptionist, and therefore was in the unit. Weinmann also asserted that the fact that some receptionists might drive on occasion, did not operate to exclude from the unit. Weinmann demanded that the Company meet and bargain with the Union. These letters constituted the final discussions between the parties and there were no further negotiations. At the present hearing Company counsel asserted, in sum, that the Company had a good faith doubt of the Union's majority status because the Union sought a contract covering employees who were outside of the bargaining unit.

The arbitration hearing resumed on April 24, continued on May 5 and 18 and June 26, and concluded on June 27. Carlos Quintana testified for the Union at the April 24 session. On November 10 (after testimony was completed in the present unfair labor practice hearing) Arbitrator Lande issued his Opinion and Award. The ultimate questions presented in the proceeding were whether the Company violated the contract by failing to contribute monies to the insurance and severance funds and to the Union on behalf of employees, and if so, what remedy was appropriate. However, the fact of nonpayment and the Union's mathematical calculations were not in dispute. Rather, as recognized by the Arbitrator, the arbitration called for a determination as to which employees, both

past and present, were in the unit. The principal question as presented by the parties was whether the employees at the branch facilities were receptionists, as contended by the Union, or office clerks (or otherwise in an excluded category) as contended by the Company. However, the Arbitrator concluded that the issue was not whether the employees were receptionists or office clerks, but whether they were properly included in the unit. After reviewing the evidence the Arbitrator found that in some respects, the employees fell into both job categories. He found "most significant" testimony by Michael Ortiz to the effect that the employees at the branch facilities performed the functions of both receptionists and office clerks because they greeted customers and showed

them the chapels, as well as filling out forms and doing paper work. He further found that they performed other functions, the extent of which will be discussed under the next heading of this Decision. The Arbitrator found that the employees at issue could not be categorized exclusively as receptionists or office clerks. Rather, he applied what he considered to be fundamental principles of labor relations, namely that an employee who is sequestered by the employer from the unit cannot be assigned to perform unit work unless the employer complies with unit obligations, i.e., the contract, and that an employee who performs most of his job doing unit work is properly included in the unit, even though he may be assigned additional, nonunit work. The Arbitrator further held

that those employees at issue who regularly performed substantial bargaining unit work were properly included in the unit. Applying these principles to the evidence, the Arbitrator held that the Company was obligated under the contract to make payments on behalf of some 100 of the employees at issue, including all of the disputed employees listed on the Company's payroll as of March 28 except "secretary-bookkeeper" Nancy Ortiz.

The Union filed a petition in the New York State Supreme Court to confirm the Arbitrator's Award, and the Company filed a cross-petition to vacate and set aside the Award. On February 20, 1979, Judge Schwartz of the Supreme Court issued a Decision vacating and setting aside the Award. Judge Schwartz noted that paragraph

7(h) of the collective-bargaining contract provided that the Company shall notify the Union of the "classification" of each newly hired employee. He held that the Arbitrator "did not merely interpret the language of the agreement but actually re-classified employees in order to render his award." Judge Schwartz held that this "reclassification" was in direct violation of the Company's right under the contract to classify its employees, and that therefore the Arbitrator exceeded his power in making the Award, in that the Arbitrator had no authority to alter the contract. I have not been informed that the Union has filed any appeal from the Decision of Judge Schwartz. Therefore, it may be presumed that his Decision constitutes the final disposition of the arbitration pro-

ceeding.

B. Findings With Respect to the Bargaining Unit, and Concluding Findings with Respect to the Alleged Unlawful Refusal Recognize and Bargain with the Union

The threshhold question posed by the foregoing facts concerns the weight which should be accorded to the disposition of the arbitration proceeding. As a matter of law, the Board is not bound by an arbitration award. Spielberg Manufacturing Company, 112 NLRB 1080, 1081 (1955). Rather, the Board may at any time invoke its "superior authority to pass upon and if necessary remedy alleged unfair labor practices," including questions, e.g., of whether "employees involved in the controversy are members of one bargaining unit or another, which have been or are the subject

of contractual arbitration proceedings." Carey v. Westinghouse Corp., 375 U.S. 261, 272 (1964). However, as a matter of policy, the Board will normally defer to an arbitration award if "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." Spielberg, supra, 112 NLRB at 1082.

Interestingly, none of the parties in the present case have argued that there should be a deferral to the arbitration proceeding. The present case is somewhat unusual in that the arbitrator's award was judicially set aside. Therefore, the final disposition of the arbitration proceeding consists not of the Arbitrator's Opinion

and Award, bur rather, of the Decision of Judge Schwartz vacating and setting aside that Award. Insofar as Judge Schwartz' Decision may be deemed as an affirmative disposition of the arbitration proceeding in favor of the Company, deferral is not appropriate, because Judge Schwartz based his decision on a premise which is contrary to Board law. Judge Schwartz held, in essence, that the employer's own classification of the employees whose status is in dispute, must be deemed conclusive on the question or [sic] whether they are included in the bargaining unit. This is not the standard which is followed by the Board. Rather, in making this determination the Board will determine "whether in reality they constitute a functionally distinct

group and whether as a group they do have overriding special interests; and . . . this determination must be based upon the factual situation existing in each case and not upon title, tradition or practice." Kalamazoo Paper Box Corporation, 136 NLRB 134, 138-139 (1962) (emphasis added). Moreover, "dual-function employees," i.e., those who perform both unit and nonunit work, are included in the unit if they are regularly employed at unit work for sufficient periods of time to demonstrate that they have a substantial community of interest in the unit's wages, hours and conditions of employment, even though such work may occupy less than one-half of their working time. Berea Publishing Company, 140 NLRB 516, 518-519 (1963). In the present case,

the Board's standards are particularly important, because the unit was formulated through the processes of Board litigation. Although the Company and the Union were involved in negotiating the settlement of the first unfair labor practice case, the unit was formulated as part of a Board settlement of that case. Moreover, the unit was subsequently found appropriate and confirmed by the Board in the later unfair labor practice case. Therefore, at least for the purpose of determining the composition of the bargaining unit, the Board settlement and the subsequent Board Decision and Order in the litigated unfair labor practice case are the equivalent of a certification following a Board conducted election.

I do not agree with General Counsel's

assertion at the hearing that in deciding this case, I need not consider the composition of the unit. It is evident from the history of litigation between the parties, that much time, expense and effort have been expended, precisely because that question has not been resolved. In effect, General Counsel would have me resolve this case in the same manner that the previous unfair labor case was decided. If so, than [sic] this case would better have been brought by way of contempt proceedings in the Court of Appeals. In retrospect, it is evident that the previous case failed to resolve the underlying dispute between the parties, and thereby simply became the prelude to further litigation. Moreover, the factors on which the Administrative Law Judge relied are either

not now present or are distinguishable. The Company raised the matter of unit composition in a timely fashion, i.e. at the outset of negotiations. Indeed there was a pending arbitration proceeding involving that question. Although a bargaining unit is defined by classifications rather than names, there was and still is a serious question as to the meaning and scope of those classifications, involving most of the Company's employees. In light of the Decision of Judge Schwartz, the Company's position can hardly be characterized as frivolous. Moreover, the grievance and arbitration machinery which the Administrative Law Judge anticipated would resolve the dispute, has failed to resolve that dispute in a manner which is consistent with the purposes and policies of the

Act. Therefore, I find that it would effectuate the purposes of the Act to resolve the unit composition matter.

The next question concerns the weight, if any, to be accorded to the Arbitrator's Opinion and Award, which now stands nullified by judicial decision. In arriving at his Decision, the Arbitrator utilized principles which although not wholly identical with those followed by the Board, were not as clearly in conflict with Board law as that relied upon by Judge Schwartz. However, the Arbitrator, as well as the parties to this case, seem to have fallen into a misconception of the term "office clerical employees," although the Arbitrator found it unnecessary to decide whether any employees were properly so categorized. For many years, since its Decision in D.M.

Steward Manufacturing Company, 102 NLRB 461, 462 (1953), the Board has used the two distinct terms, "office clerical employees," and "plant clerical employees" to define categories of employees performing clerical work. Normally, in an industrial setting, plant clericals are presumed to have a community of interest with the production and maintenance employees, and therefore will be included in the production and maintenance unit unless the parties have agreed basically to include all plant clericals as a class. Raybestos Manhattan, Inc., 115 NLRB 1036, 1038 (1956). Conversely office clericals, who often work in close proximity and association with management, are usually excluded from a production and maintenance unit.

The Company's branch chapels, like the chapels which are located at the Company's main facility, are the equivalent, in industrial terms, to the "plant," i.e. the locus where the employer's business, whether it be production, distribution, sales, service or what have you, is actually performed. The Company's branch facilities are not offices; rather, as correctly identified on the Company's letterhead, they are "chapels," where part of the Company's normal operation, i.e. the performance of funeral and related services, is performed. The presence of a desk, typewriter or forms does not operate to convert these facilities into offices, any more than the presence of such equipment in a workshop or warehouse operates to convert those premises

into offices. Indeed, some of the branch facilities do not even have typewriters. Even the use of the telephone, normally an important factor in any "office," is limited. The branch employees are permitted to use the Company's telephones only to receive incoming calls. To make outgoing calls, they must use a coin operated public phone on the premises (for which they are reimbursed for business calls), and the employees are normally expected to use those phones only for the purpose of reporting information to the main office. The main office is in fact the Company's only "office," insofar as the Board normally uses that term. The main office is the location where management functions, operations are directed and coordinated, bookkeeping is performed,

bills are processed, payments made and received, and where personnel and most other records are kept. To the extent that paper work is performed at the branch locations, i.e. the preparation of simple forms and applications for customers such work is incidental to the principal function of performing funeral and burial services. In sum, it is the equivalent of "plant clerical" work which is incidental to and performed in close proximity to the employer's normal operations.

Although the Board has not expressly made an equation between the operation of funeral homes and industrial plants, the Board has in essence applied the foregoing principles in representation proceedings involving funeral homes. Thus, in D.W. Newcomer's Sons, 117 NLRB 565, 566 (1957),

the Board found appropriate a unit of funeral home employees which included "clerical-receptionists." These employees spent 25 percent of their time at the switchboard, located in the auditing department. The remainder of their time they acted as receptionists and hairdressers. Their duties as receptionists required them, along with the assistant funeral director, to meet people at the door of the funeral home at the time of the service, escort them to the proper chapel, and take them to the reposing room. The Board found that notwithstanding their substantial office functions, they performed work "closely allied with that performed" by other funeral home workers, and therefore included them in the unit. In contrast, the branch employ-

ees in the present case perform all of their normal functions, clerical or otherwise, away from the main office. Conversely, in Riverside Memorial Chapels, Inc., 226 NLRB 2, 3 (1976), the Board excluded from an appropriate unit of funeral home employees, administrative personnel and switchboard operators whose "duties are primarily clerical and do not substantially contribute to the rendition of the funeral service or arrangements" (emphasis added.)[7]

In the arbitration proceeding, the Company adduced the testimony of one Franklin Brescia, an alleged expert witness with respect to the funeral home industry. Brecia's [sic] qualifications consist, in sum, of the fact that he is a licensed funeral director who operates a funeral

home business (essentially catering to the same potential market as the Company) and that he previously worked for other funeral home firms, but not the Company. Brescia testified that a "receptionist" is an employee whose only functions consist of greeting people as they come to the home, and directing them to the chapel, and that an "office clerical" assists the funeral director in preparing papers. However, it is evident that Brescia's knowledge was based on funeral homes where there were two or more personnel on duty, and that he had no familiarity with the type of operation conducted by the Company. Brecia [sic] testified that in his experience, a licensed funeral director was always on the premises, that a trainee assisted the director

in moving the body within the chapel, that most homes supplied their own "extra man," that the receptionist was the "man at the door," and that the receptionist never filled out forms or assisted in moving the body. Brecia [sic] further testified, in essence, that in his view the Company's modus operandi at its branch facilities was at least in part unlawful. Brecia [sic] testified that by reason of Department of Health regulations (which he did not cite, and which were not otherwise cited), only a licensed funeral director can discuss prices, give substantive information, or even take information from customers or prospective customers. According to Brecia [sic], the unlicensed "receptionist" can only put the customer in contact with a licensed funeral direc-

tor. However, witnesses for the Union, as well as witnesses for the Company (Edna Mattei and James Sibley) testified that the branch employees give information including prices, to prospective customers. Absent authority to the contrary (and none has been shown) I must assume that the Company is operating in a lawful manner. In sum, I find that Brecia's definition of job categories bears no meaningful relation to the Company's type of operation. I further find that the evidence adduced at the arbitration hearing fails to indicate that there is any commonly understood definition of the term "office clerk" which is unique to the funeral home industry and which would be applicable to the Company's operations. Therefore, it is appropriate to apply the Board's own

application of that term, particularly where as here, the unit was formulated through the processes of Board litigation, and not simply as a result of collective bargaining between private parties.

The evidence adduced at the arbitration hearing indicates that as of March 28, the Company had only two office clerical employees, as that term is utilized under Board law. The status of secretary-bookkeeper Edna Mattei is not disputed. Mattei testified that Nancy Ortiz (denominated "secretary-bookkeeper" on the Company's list) was actually an assistant bookkeeper who helped Mattei with the Company's books. The evidence does not indicate that Nancy Ortiz worked at any branch location, or performed anything other than clerical work. Therefore Nancy

Ortiz, like Mattei, was an office employee, and not in the bargaining unit. The remaining employees as of March 28, whose status is in dispute, were identified as working regularly at the branch locations. Therefore, they were not office clerical employees, regardless of the fact that they performed paperwork which was incidental to the "funeral service or arrangements." Riverside Memorial Chapels, supra.

If the branch employees are not office clerks, then what are they? The branch employees perform a variety of functions. They answer telephone calls from the main office and from customers and the bereaved family. When prospective customers come in, they will take down information, answer their inquiries,

give them pertinent information, including estimated costs, and place them in contact with the main office for the purpose of making definite arrangements. The branch chapels have catalogues with pictures of different types of caskets, and in some locations there are showrooms with caskets on display. The branch employee shows these to prospective customers and indicates prices. Once an agreement is consummated, the branch employee assists in coordinating and making arrangements for the funeral service and burial, e.g. by arranging for or ordering masses or other types of service, flowers, prayer cards, or airline tickets if the body is to be shipped overseas. The branch employee acts as an agent for the sale of flowers and airline tickets,

and receives a commission for such transactions. The branch employee assists in moving the body within the branch premises. At the funeral service, the branch employee greets people and directs them to the chapel (it is undisputed that such work at least, constitutes work traditionally performed by a "receptionist"). The branch employee is also responsible for keeping the branch premises in a clean and orderly condition. The branch employees pick up burial permits, complete certain types of forms, such as social security forms, applications for transcripts, and applications for insurance or welfare fund benefits, and they check with insurance companies and union welfare funds concerning such benefits. Union witness Jose Martin, a former em-

ployee who worked at various branch facilities, testified that it took him about 20 minutes to perform perper [sic] work in connection with each funeral. Company witness Edna Mattei testified that it normally takes about 2 hours for a branch employee to perform the clerical work in connection with a funeral. Company President Ortiz initially testified that all of the paper work relating to the customer is performed at the branch chapels. (He conceded that paperwork pertaining to the Company's general operations, e.g. maintenance and personnel matters is performed at the main office). However, Ortiz' assertion was contradicted both by his own testimony and by that of Edna Mattei. Ortiz admitted that the branch employees can only prepare "simple forms",

such as those described above, and that more difficult forms, such as property forms and those requiring notarization, must be prepared at the main office. Mattei also testified that the branch employee cannot fill out all of the forms and that much of the paperwork must be done at the main office. It is evident from the nature and variety of functions performed by the branch employees, that they cannot effectively perform their functions unless they are bilingual in English and Spanish. Edna Mattei testified that the Company requires its employees to be bilingual, and Union business agent James Leahy testified that the branch employees whom he observed were bilingual, although their native language was usually Spanish. For this reason, and

for others which will be discussed in the next section of this Decision, I do not credit the testimony of Carlos Quintana that he cannot communicate in the English language. (Quintana testified in Spanish, through an interpreter, in both the arbitration and the present proceeding).

The Company conducts approximately 800 funerals annually, or an average of about 15 per week. As indicated, the Company has several chapels at its main location, in addition to the nine branch chapels. Some branch locations, such as the Westchester Avenue Chapel in the Bronx, are busier than others. Edna Mattei testified that some chapels might go for 4 or 5 weeks without a funeral. It is evident from these figures that a typical branch chapel might have an aver-

age of one or occasionally two funerals per week. It is also evident that a major function of the branch employees, although not referred to in testimony, is simply that of waiting for customers, and that the branch employees probably spend most of their time in this manner. By maintaining the branch facilities, and by stationing knowledgeable, albeit unlicensed personnel at each location throughout the day and evening hours, the Company has made itself accessible to the Hispanic community in New York City in a manner which it could not reasonably expect to achieve if it confined itself to premises where a licensed funeral director was regularly on duty. Thereby the Company has expanded or seeks to expand its volume

of business, and the branch employees serve an important function, even during the lengthy periods of time when they have little or nothing to do.

To the extent that the branch employees greet people who come to the branch facilities, and direct them to the chapel, the branch employees perform work which even under the Company's narrow definition, would constitute that of receptionists. To the extent that they perform routine cleaning and maintenance, their work is that of porters, which is also bargaining unit work. As indicated, none of the branch employees perform office clerical work, as distinct from clerical functions which are incidental to the Company's normal operations. With the arguable exception of James Sibley, which will be dis-

cussed, none of the branch employees in dispute regularly performed functions which would place them in any other excluded category.[8] The Union, through the testimony of business agent James Leahy, argued that the functions of a receptionist are more extensive than those conceded by the Company. Leahy testified in sum, that receptionists performed additional functions including those performed by the branch employees, e.g., answering the telephone, picking up permits, moving the body within the branch facility, and filling out simple forms. The Union contends that the terms "attendants" and "floor-people" contained in the unit description, are synonymous with its concept of "receptionists." The Dictionary of Occupa-

tional Titles, U.S. Department of Labor, (4th Ed., 1977), classifies a "funeral attendant" as a person who performs a variety of tasks during a funeral, including some performed by the Company's branch employees, i.e., placing the casket in the chapel prior to the wake or funeral service, and directing or escorting mourners to the parlor or chapel in which the wake or funeral is held. The Dictionary of Occupational Titles does not contain any definition of the terms "receptionist," "floor person" or "office clerk" which is pertinent to the work normally performed by the branch employees. The definition of "funeral director" does not encompass the functions of the branch employees, and specifically, makes no reference to paper-

work. In sum, the evidence fails to indicate that the crucial classifications contained in the unit description have any special, commonly understood significance in the funeral home industry which is pertinent to the Company's unique method of operation. In these circumstances, it is appropriate to look to the generally understood meaning of those classifications. In the context of the employment relationship, an attendant is normally regarded as an employee who waits on customers. See, Websters Third New International Dictionary, (1971 edition). Essentially such work compromises [sic] the largest part of the work normally performed by the branch employees. In sum, whether they be designated as receptionists, recep-

tionist-porters, or more accurately, as attendants, and regardless of whether the Company has incorrectly classified them as office clerks, the employees at the branch locations perform unit work and are members of the bargaining unit. With respect to James Sibley, designated on the Company's March 28 list, he is in fact licensed as a funeral director, and therefore authorized by law to perform the functions of that position, including removal of the body from hospitals or homes, arranging with the families for funeral, obtaining burial permits, and embalming if necessary. In fact, Sibley did not work for the Company in the capacity of a funeral director. Rather, he worked the night shift at various branch chapels, performing the same work as the other

branch employees. Sibley usually worked at the Fourth Avenue chapel, which averaged one funeral a week. Therefore, I find that he was a branch employee who was at the times material, included in the bargaining unit.[9]

It follows from the foregoing findings, that on and after March 28, the Company failed and refused to recognize and bargain with the Union as the representative of all of the employees in the Board-designated unit, and instead, erroneously insisted that the Union had no standing to represent more than a small franction [sic] of those employees. The Company's asserted "good faith question" as to the Union's majority status was based on the erroneous premise that by requesting bargaining for a contract

which would cover the branch employees, the Union was claiming recognition for a new or different bargaining unit, and therefore the Company could demand proof of majority status. However, it was the Company, and not the Union, which was seeking to alter the bargaining unit. The Company's erroneous position, whether or not asserted in good faith, does not constitute a valid defense to a refusal-to-bargain charge. Moreover, in the context of the present case, the Company had no standing to question the Union's majority status. An employer may, with certain other qualifications, withdraw recognition from an incumbent union if the employer's refusal to bargain is based on a reasonably grounded doubt as to the Union's majority status, asserted in good faith, based on

objective considerations, and raised in a context free of employer unfair labor practices. The Company had no standing to question the Union's majority status, because its asserted doubt was raised in the context of unremedied employer unfair labor practices. As a result of Board litigation, the Company entered into a settlement agreement whereby it agreed, inter alia, to recognize and bargain with the Union as the representative of the employees in the appropriate unit. In subsequent litigation, the Board found that the Company was violating that obligation, and ordered the Company to fulfill its bargaining obligations. In fact, the Company never recognized the Union as the bargaining representative of more than a small fraction of the unit employees. The

Company signed a negotiated contract with the Union, only because it was ordered to do so, but the Company refused to apply that contract to most of its unit employees. Indeed, the Arbitrator's Award indicates that the Company did not even make welfare and severance fund payments for those employees whom it conceded to be in the bargaining unit. Therefore, the Company's unfair labor practices have never been remedied, and the Union is entitled to a continuing presumption of majority status. See, Electralab Electronics Corporation, 146 NLRB 328, 330 (1964); Hermet, Inc.,207 NLRB 671 (1973).

Furthermore, the Company's asserted doubt was based on the premise that the Union was required to prove union membership for those employees whom it sought to

represent. However, with respect to an incumbent union, it is the employer who must affirmatively show that a majority of the employees no longer desire union representation, and as indicated, that recognition was withdrawn in a context free of unfair labor practices. The Company failed to do this. Indeed, the Company did not even agree to recognize the Union upon a showing a majority status. Rather, the Company simply indicated that it would recognize the Union on a members--only basis for those employees who the employer incorrectly claimed to be outside of the bargaining unit. In sum, I find that the Company failed and refused to recognize and bargain with the Union as the exclusive representative of its employees in the appropriate unit, and

thereby violated Section 8(a)(5) and (1) of the act.[10]

* * *

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees at the Company's main office and facility and at its branch locations, including receptionists, receptionist-porters, office clerks, office managers and office clerk-drivers, but excluding licensed funeral directors, secretary-bookkeepers and drivers normally and regularly engaged in the performance

of such functions, and excluding supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been, and is, the exclusive collective-bargaining representative of the employees of the Company in the unit described above.

5. The Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, by failing and refusing to recognize and bargain in good faith with the Union as the representative of the employees in the appropriate unit.

6. The Company has not engaged in

the unfair labor practices alleged in the complaint in Case No. 2-CA-15536.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Company has committed violations of Section 8(a)(1) and (5) of the Act, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Company be ordered to recognize, and upon request bargain with the Union as the bargaining representative of the employees in the appropriate unit, and to

post appropriate notices. As indicated, the definition of the unit has been revised to reflect the Company's most recent job classifications (The Company has not employed guards or watchmen since the 1974 strike. The former classifications of licensed embalmer and undertaker no longer exist, as persons performing such work are now licensed as funeral directors). As the complaint alleges an unlawful refusal to bargain only since on or about March 28, 1978, I have not provided any remedy for the Company's failure to apply the terms of the expired contract to the unit employees.

Upon the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[12]

ORDER

Respondent, Ortiz Funeral Home Corp., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively with Local 1034, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees at Respondent's main office and facility and at its branch locations, including receptionists, receptionist-porters, office clerks, office managers and office clerk-drivers, but excluding licensed funeral directors, secretary-bookkeepers and drivers normally and regularly engaged in the performance of such functions, and excluding supervisors as defined in Section 2(11) of the Act.

(b) In any like or related manner interfere with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with the above named Union as the exclusive representative of all employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its main office and facility and at each of its branch facil-

ities, copies of the attached notice marked "Appendix."[13] Copies of said notice in English and Spanish, on forms provided by the Regional Director for Region 2 after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply here-

with.

3. The complaint in Case No. 2-CA-15537 is dismissed in its entirety.

Dated, Washington, D.C. December 26, 1979

S/ MARVIN ROTH
Marvin Roth
Administrative Law Judge

FOOTNOTES

1. All dates herein are in 1978 unless otherwise indicated. As a result of a series of events, including: lengthy delay in forwarding documentary evidence which was to be submitted by stipulation of the parties; a motion by General Counsel to reopen the hearing and consolidate the case with a new complaint, which later case was subsequently settled; a motion by General Counsel to delay closing the record, pending further investigation; and a motion by General Counsel to reopen the hearing to adduce further evidence (none of which would have added to the merits of the case); the record was not closed until August 6, 1979.

2. By a separate order annexed to this Decision, I have directed that the official transcript of proceedings be corrected in certain minor or obvious respects. The record of the present case also includes an 800 page transcript of proceedings before Arbitrator David S. Lande of the New York State Mediation Board. The arbitration proceeding is intimately involved with, and will be discussed in connection with the present case. At the present hearing, I ruled that the arbitration record would be considered in lieu of presentation of evidence at the unfair labor practice hearing, concerning unit placement of employees.

3. As will be discussed, one of the facilities, the East New York chapel, was not actively functioning during most of this period.

4. The Board's findings and conclusions in the unfair labor practice case are res judicata as to the matters covered therein, and cannot be relitigated in the present case. Laborers International Union, Local No. 282 (Millstone Construction Company, 236 NLRB No. 70 (1978), JD at 6. Therefore, I have not taken into consideration, testimony by Company president Ortiz in the arbitration proceeding concerning his version of the 1975 negotiations.

5. The foregoing account of the March 13 meeting is based on a composite of the testimony of Martin Adelstein and Michael Ortiz. In view of Ortiz' testimony that he stated that he was not there to negotiate a contract, I do not credit his assertion, in a subsequent letter to the Union, that he came both to resolve the arbitration and to open contract negotiations. As the complaint alleges an unlawful refusal to bargain "Since on or about March 28, 1978" (the date of the next meeting between the parties), it is unnecessary for me to decide whether Ortiz acted unlawfully by refusing to discuss contract terms on March 13.

6. Michael Ortiz testified that in

September, 1977, he understood from one of the Adelsteins that the Union intended to send out letters to each of the employees, requesting their job titles and job description. Bernard Adelstein testified that the Union tried to take such a survey, but did not get responses from all of the employees.

7. In the arbitration proceeding, the Union submitted to the Arbitrator an unreported representation case decision in Jeffers Funeral Homes, Inc., Case No. 29-RC-2143, which apparently discussed the duties of "floormen." No party has submitted that Decision to me, and I have not taken administrative notice of it. Such decisions are res judicata only with respect to related cases involving the same employer, and do not constitute authoritative Board precedent.

8. The Company's March 28 list designated Carlos Cruz as an "office clerk-driver." Union witness Conrado Hernandez, a former employee, testified in the arbitration proceeding that Carlos Cruz was a receptionist--driver who worked at the Havemeyer Street chapel. Cruz normally worked on the second shift, Carlos Quintana being the first shift employee at Havemeyer. Cruz sometimes drove for the Company before relieving Quintana. Cruz, who was a Company witness in the present case, testified that he was an office clerk and a "manager". However, he admitted that like the other

branch employees, he worked alone, and did not "manage" any one but himself. In sum, his work was substantially the same as that of the other branch employees. The Company's list designated Cruz Melendez, who worked at the 72nd Street chapel, as an "office manager". However, Edna Mattei testified that he was given this title because of his length of service. At one time Melendez coordinated activities from the main office; however, as of March 28 he was a branch employee. The Company's list variously designated some of the employees in dispute as "manager" or "secretary". However, all of them were identified as working at the branch chapels. Indeed, Edna Mattei conceded in her testimony that some of them should have been designated as office clerks, i.e., the Company's term for branch employees.

9. In making the foregoing findings, I have taken into consideration the Opinion and Award of the Arbitrator. However, I have made an independent evaluation of the evidence. As indicated, I have arrived at the same ultimate findings concerning unit placement of the employees as of March 28. However, I have arrived at those findings for different reasons than those advanced by the Arbitrator. The Board has held that where the result of an arbitration proceeding does not warrant deferral because it is repugnant to the Act, the

better procedure is for the Administrative Law Judge to make independent findings of fact, rather than to defer to the arbitrator's findings of fact. Pincus Brothers, Inc.--Maxwell, 237 NLRB No. 159 (1978), sl. op at 9.

10. In view of the foregoing findings, I find it unnecessary to pass on General Counsel's contention, essentially based on the alleged violations of Section 8(a)(1) and (3) of the Act involving Carlos Quintana, that the Company acted in bad faith in refusing to bargain with the Union. As will be discussed, I am recommending that those allegations be dismissed.

* * * *

12. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

13. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS

BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

* * *

Opposition

No. 81-1174

Office - Supreme Court, U.S.
FILED
JAN 29 1982
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

ORTIZ FUNERAL HOME CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD
AND
LOCAL 1034, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board correctly found that petitioner's branch employees were covered by the unit definition agreed upon by the parties.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 651 F. 2d 136. The decision and order of the National Labor Relations Board (Pet. Supp. App. 23a-40a), which includes the decision of the administrative law judge (Pet. Supp. App. 41a-124a), are reported at 250 N.L.R.B. 730.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1981. A petition for rehearing was denied on October 5, 1981 (Pet. App. 21a-22a). The petition for a writ of certiorari was filed on December 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, which operates a funeral business, has a main office in the Bronx, which contains several chapels, and various branch facilities in the New York City metropolitan area (Pet. Supp. App. 45a-46a). In 1975, following an organizational strike and unfair labor practice charges, an informal settlement agreement was reached between petitioner and respondent Local 1034 (the Union), and the agreement was approved by the Board's Regional Director (*id.* at 46a-47a). Pursuant to this agreement, petitioner agreed to recognize and bargain with the Union as the exclusive representative of the employees in the following unit:

> All attendants, floorpeople, receptionists, interpreters and porters, excluding all licensed embalmers, undertakers, drivers, managers, official clerical employees, bookkeepers, guards, watchmen and supervisors as defined in Section 2(11) of the Act.

Id. at 48a. Prior to the strike, petitioner usually had two employees working together at each branch facility (*id.* at 46a).[1] After the strike, because the volume of business had diminished, petitioner streamlined its operation by providing, among other things, that only one employee regularly be on duty at a time at each of the branch chapels (*id.* at 48a-49a).

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[1]The employees who work at the branch chapels perform a wide variety of functions. They answer telephone calls from the main office and from customers and the bereaved family. When prospective customers come in, the branch employees take down information, answer their inquiries, and give them pertinent information including estimated costs. Often, they must act as interpreters because petitioner's clientele are predominately Hispanic. For this reason, it is required that branch employees be able to speak both English and Spanish. The branch employees show catalogue and casket displays to prospective customers and indicate prices. If definite arrangements are to be made, the branch employees put the customer in contact with the main office. The branch

Pursuant to the settlement agreement, petitioner and the Union negotiated a collective bargaining agreement. The parties disagreed, however, over the number of employees in the bargaining unit: the Union contended that there were 18 to 21 employees, while petitioner asserted that it had eliminated its receptionists when it streamlined its staff and that there remained only three or four unit employees, the rest of the branch employees being excluded as office-clericals (Pet. Supp. App. 49a-51a). Petitioner refused to sign the agreed-upon contract unless it specified the named individuals subject to it, and the Union filed unfair labor practice charges. The Board, upheld by the court of appeals, ordered petitioner to execute the contract. 225 N.L.R.B. 1342 (1976), enforced, 559 F. 2d 1204 (2d Cir. 1977).[2] Petitioner thereupon signed the agreed-upon contract, which was effective by its terms from March 22, 1975, through March 21, 1978. Pet. Supp. App. 51a-53a.

The contract contained provisions for a union shop, checkoff of union dues, and employer payments to welfare,

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employees also assist in coordinating and making arrangements for the funeral service and burial. These preparations include arranging for masses and the ordering of flowers, prayer cards, or airline tickets if the body is to be shipped overseas. At the funeral service, the branch employees greet people and direct them to the appropriate chapel. They are responsible for keeping the branch premises in a clean and orderly condition and for assisting in the movement of bodies within the facility. They also pick up burial permits, fill in simple forms, and check with insurance companies and union welfare funds concerning relevant benefits. Pet. Supp. App. 94a-96a. At the main office, there are two employees, a secretary-bookkeeper and her assistant, who perform only clerical work (*id.* at 93a-94a).

[2]The Board found that, assuming that petitioner had a "genuine dispute" as to the identity of the covered employees, the arbitration clause of the agreement was designed to resolve any uncertainty as to membership in the bargaining unit. 225 N.L.R.B. at 1345. The Board did not discuss the relative merits of the parties' contentions as to which specific employees were included in the unit.

severance, and retirement funds. Petitioner applied these provisions only on behalf of the three or four employees whom it considered to be in the bargaining unit. In August 1977, after conducting an audit of petitioner's payroll records, the Union concluded that petitioner was failing to make contributions as provided in the contract. Discussion of the issue proved fruitless because the Union focused on the nature of the work performed by the employees, and petitioner emphasized the job titles that it assigned to the employees. Accordingly, the Union invoked the contractual arbitration process. Pet. Supp. App. 54a-55a.

The arbitrator ruled that all of the disputed employees, except for one "secretary-bookkeeper" employed at the main office, were included in the unit (Pet. Supp. App. 74a). The New York State Supreme Court vacated the arbitrator's award on the ground that the arbitrator had exceeded his power by reclassifying employees, but the Appellate Division, First Department, reversed and reinstated the award. See *Adelstein* v. *Ortiz Funeral Home Corp.*, 75 A.D.2d 529, 426 N.Y.S.2d 768 (1980). The New York Court of Appeals affirmed without opinion. See Pet. App. 7a.

2. While the arbitration under the old contract was pending, the parties met in March 1978 to discuss a new contract. Their continuing disagreement regarding the composition of the bargaining unit, however, precluded any progress toward consummation of a contract. Of 22 employees, petitioner agreed that three were in the unit, and the Union agreed that three were not in the unit (Pet. Supp. App. 59a-66a). The Union again filed unfair labor practice charges with the Board, alleging a refusal to bargain. The administrative law judge, whose decision was adopted by the Board, found that, except for one main office employee, properly classified as a secretary-bookkeeper (*id.* at 93a-94a), all of the disputed employees were properly included

in the agreed-upon unit (*id.* at 84a-106a).[3] Thus, the law judge found that only the two employees who worked in the main office were office-clericals, as that term is used under Board law (*id.* at 93a). He noted that the disputed branch employees performed only a limited amount of clerical work, which was "incidental" to the principal function of performing funeral and burial services (*id.* at 94a). He also noted (*id.* at 101a):

> To the extent that the branch employees greet people who come to the branch facilities, and direct them to the chapel, the branch employees perform work which even under [petitioner's] narrow definition would constitute that of receptionists. To the extent that they perform routine cleaning and maintenance, their work is that of porters, which is also bargaining unit work.

The administrative law judge concluded (Pet. Supp. App. 104a-105a):

> [T]he evidence fails to indicate that the crucial classifications contained in the unit description have any special, commonly understood significance in the funeral home industry which is pertinent to [petitioner's] unique method of operation. In these circumstances, it

---

[3]In so holding, the Board did not defer to the arbitrator's award because the issue was one of representation and appropriate unit (Pet. Supp. App. 37a-38a n.2). However, the law judge admitted into evidence the record before the arbitrator "in lieu of presentation of evidence at the unfair labor practice hearing, concerning unit placement of employees" (*id.* at 119a n.2). At the time of issuance of the law judge's decision, the New York Supreme Court had vacated the arbitrator's decision, and the law judge did not defer to either the arbitration award or the decision vacating it (see *id.* at 76a-84a). At the time of the Board's decision, the New York Supreme Court decision had been reversed by the Appellate Division (*id.* at 37a n.2).

> is appropriate to look to the generally understood meaning of those classifications. In the context of the employment relationship, an attendant is normally regarded as an employee who waits on customers. * * * Essentially such work compromises [*sic*] the largest part of the work normally performed by the branch employees. In sum, whether they be designated as receptionists, receptionist-porters, or, more accurately, as attendants, and regardless of whether [petitioner] incorrectly classified them as office clerks, the employees at the branch locations perform unit work and are members of the bargaining unit.

The Board, adopting the administrative law judge's findings and conclusions, thus held that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing, on and after March 28, 1978, to recognize the Union and bargain with it for a new contract covering all unit employees (Pet. Supp. App. at 24a-25a), and by refusing to apply the old contract to all unit employees when that contract was in force (*id.* at 28a).

3. The court of appeals enforced the Board's order (Pet. App. 18a). The court stated that "[petitioner] and the Union could not agree whether employees whose duties included clerical work, driving, or guarding, in addition to receiving visitors, were properly included as 'receptionists' in the bargaining unit" (*id.* at 4a). The court further stated that "[t]he question was one of contract interpretation that should have been governed by the intentions of the parties" (*id.* at 15a). The court of appeals faulted the Board for not focusing explicitly on the parties' intentions (*id.* at 16a-17a). But the court held that "[t]he parties clearly intended to be bound by the arbitrator's decision" and thus that decision should have been accepted as indicative of the parties' intent (*id.* at 17a-18a). Because the Board reached precisely the

same result regarding the composition of the bargaining unit as did the arbitrator, the court enforced the Board's order (*ibid.*).

ARGUMENT

Petitioner raises several fact-bound contentions about the correctness of the Board's procedures and conclusions concerning the employees contained in the bargaining unit. These issues are not before this Court. The court of appeals looked to the intent of the parties in entering into the contract. It found that the parties intended to be bound by the arbitrator's decision, and thus it enforced the Board's order, which reached the same result as the arbitrator. Thus, it is only the court of appeals' ruling on the parties' intent that is before this Court. Petitioner's attempts to have the arbitrator's unfavorable decision vacated when petitioner was dissatisfied with the result (see Pet. 22-24) clearly cast no doubt on the court of appeals' conclusion that, before they knew what the decision would be, the parties agreed to be bound by the arbitrator's decision.

In any event, the Board's decision was correct. Resolution of the issue depends not on the label that petitioner attached to specific employees, but on whether the parties intended that employees performing certain work would be included in the unit. See *NLRB* v. *Detective Intelligence Service, Inc.*, 448 F. 2d 1022, 1025 (9th Cir. 1971). The Board interpreted the agreed-upon unit definition by examining the work performed by the disputed employees and then applying generally understood meanings to the words used in the unit definition.[4] This approach was reasonable, and it raises no issue warranting review by this Court.

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[4]Petitioner's assertion (Pet. 19-21) that the arbitrator and the Board both improperly altered the agreed-upon unit classifications misperceives the decisions of the arbitrator and the Board. Both undertook to determine which categories of employees were encompassed by the 1975 agreement, not to determine which employees ought to be included in a bargaining unit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1982

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Intervenor's Opposition

Office - Supreme Court, U.S.
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CLERK

81-1174

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Intervenor.

INTERVENOR'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent,

—and—

LOCAL 1034, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenor.

INTERVENOR'S MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Intervenor prays that the Court deny a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit sitting *en banc* dated June 8, 1981 which enforced an order of the National Labor Relations Board dated July 18, 1980.

Intervenor finds it necessary to set forth its position succinctly as to basic facts to be certain that the Court is not misled by the petition.

The first such fact is that it is a fiction to refer to managers and office clerical employees as though they were

separate individuals from receptionists, interpreters, porters and other employees included in the original bargaining unit in accordance with the contract. Intervenor's position is recited on pages 36 and 37 of the petition for certiorari. Essentially, there are two employees at each of nine branches of the Employer, one on each of two shifts. These individuals are versatile in that they perform all the duties of a receptionist, act as Spanish interpreters, keep the place clean, open and close it, use the telephone and fill out simple forms. Petitioner and intervenor both knew from the beginning that we were talking about these very employees and that there are no other employees employed anywhere other than certain employees working at the main branch.

Petitioner has engaged in a game of nomenclature and semantics by dubbing these individuals managers and office clericals or furnishing them with other titles to avoid the implications of bargaining unit status, even though the work they perform was and continued to be the work as described above.

In any event, a time came when both parties agreed to arbitrate the dispute before a panel arbitrator designated by counsel for each side.

The arbitration technically came about as a result of the failure of the Employer to contribute to the Insurance and Severance Funds of the Union on behalf of the misnamed employees and others. At the arbitration it was made perfectly clear by counsel for the petitioner as well as for the Union intervenor that the contributions were required if the arbitrator was to find that the employees in question were bargaining unit employees and otherwise not.

In other words, not only did the petitioner fail to take exception to the arbitration, which could not be determined

on any other basis except by determining whether the employees performed bargaining unit work or not, but petitioner participated in the arbitration precisely to determine that very question, as the transcript makes plain.

The transcript of the arbitration proceeding, which is over 800 pages long, was part of the proceedings before the National Labor Relations Board. It reveals that there was testimony about each of approximately 135 employees employed over a number of years as to what work they performed, again for the very purpose of determining whether they were bargaining unit employees or not. The arbitrator then made his award, finding that most but not all of the employees performed bargaining unit work and excluding those connected with the main office who performed other work.

The arbitrator's award was ultimately upheld unanimously by the Appellate Division, First Department, State of New York, and by the New York Court of Appeals, again unanimously. The Labor Board put an end to the game of semantics by including the same employees by whatever name in the unit.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Denied.

December 23, 1981

Respectfully submitted,

RICHARD A. WEINMANN
Attorney for Intervenor